SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 246

PAUL W. DIEHL, JR., PETITIONER,

vs.

LEHIGH VALLEY RAILROAD CO., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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APPENDIX

1. IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 12996

PAUL W. DIEHL, JR.	G. A. Gleeson, Esq.
v.	
LEHIGH VALLEY RAILROAD COMPANY	Harry E. Sprogell, Esq.
SYSTEM FEDERATION NO. 96 of THE RAILWAY EMPLOYEES DEPARTMENT OF THE AMERICAN FEDERATION OF LABOR, PAUL C. YOST, WARREN A. SHUPP, STANLEY C. BRINKMAN and STEPHEN J. PAVLINSKY, *Intervening Defendants*	William M. Gerber, Esq.

Docket Entries

1951

1	Nov. 28	Complaint filed.
	Nov. 28	Summons exit.
2	Dec. 18	Summons returned: "on Dec. 5, 1951 served and filed."
3	Dec. 26	Stipulation of counsel extending time for filing Answer to January 21, 1952 and Order of Court approving same filed. Noted 12/27/51.

1952

4	Jan. 21	Stipulation of counsel extending time for filing Answer to February 4, 1952 and

		Order of Court approving same filed. Noted 1/22/52.
5	Feb. 4	Motion to dismiss and notice of motion filed.
6	Feb. 4	Affidavit in support of motion to dismiss, filed.
7	Apr. 7	Motion of System Federation No. 96 of the Railway Employes' Department of the American Federation of Labor and Paul C. Yost, Warren A. Shupp, Stanley C. Brinkman and Stephen J. Pavlinsky for leave to intervene, filed.
8	Apr. 7	Order of Court granting leave to intervene as to System Federation No. 96, etc. *et al.* filed. Noted and Notice mailed 4/8/52.
9	Apr. 7	Motion of Intervening defendants to dismiss filed.
	Sept. 9	Argued Sur Motions to Dismiss—cont'd to 10/20/52.
10	Oct. 14	Motion for Summary Judgment filed.
11	Oct. 14	Affidavit in support of Plaintiff's Motion for Summary Judgment filed.
12	Oct. 14	Counter Affidavit of Paul W. Diehl, Jr. filed.
13	Oct. 17	Counter Affidavit Opposing Plaintiff's Motion for Summary Judgment, filed.
	Oct. 20	Hearing Sur Motions to Dismiss (submitted on briefs) C.A.V.
14	Nov. 12	Opinion, Kirkpatrick, J., dismissing complaint filed.

15	Nov. 12	Judgment Dismissing Action filed. 11/13/52 Noted and Notice mailed.
16	Dec. 10	Notice of Appeal by Plaintiff filed. 12/11/52 Copy to Harry E. Sprogell.
17	Dec. 10	Copy of Clerk's Notice to U. S. Court of Appeals filed.
18	Dec. 29	Order Extending to 3/10/53 Time Within Which to Perfect Record on Appeal filed. 12/30/52 Noted and Notice mailed.

2. [Caption omitted]

Complaint

1. The jurisdiction of this Court is founded, and this cause of action arises under the provisions of the Act of Congress known as the Selective Training and Service Act of 1940, as amended, U.S.C.A., App. Sec. 308E.

2. Plaintiff is a citizen of the United States of America and of the State of Pennsylvania, residing at 1045 E. Gordon Street, Allentown, Pennsylvania.

3. Defendant, the Lehigh Valley Railroad Company, is a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania, and doing business in the Eastern District of Pennsylvania.

4. The plaintiff was first employed by the defendant company June 24, 1942, as a Car Repair Helper, and continued in that capacity until February, 1943, when he was promoted to the position of Set-up Car Inspector and worked on an assigned job other than temporary until April 15, 1943, when said plaintiff was drafted into Military Service.

5. On or about the 20th day of October, 1945, plaintiff was honorably discharged from the United States Air Force and returned to work for the defendant company on or about November 11, 1945, as a Set-up Car Inspector.

6. On November 1, 1942, a Collective Bargaining Agreement effective November 1, 1942, between the defendant and System Federation No. 96, Railway Employes' Department, American Federation of Labor, covered the position which plaintiff left to enter Military Service.

7. A Collective Bargaining Agreement between the same parties aforementioned was entered into on August 29, 1944, covering the seniority status of employees in the mechanical crafts who have been promoted to mechanics from apprentices, helpers and coach cleaners, and on March 1, 1949, the defendant entered into a Memorandum Agreement with the Brotherhood of Railway Carmen of America relating to the seniority status of carmen helpers promoted into the position of temporary Carmen Mechanic under the provisions of Memorandum of Agreement with System Federation No. 96, dated August 29, 1944, heretofore mentioned, paragraph "Second" being set forth as follows:

> "A carman helper, who has qualified as carman mechanic, as provided in Section First hereof, and is presently working on position of a temporary carman mechanic on the effective date of this agreement, shall be given the opportunity to make

an election within fifteen days after the date of his being notified of having worked 1160 days as a temporary carman mechanic to be placed on the permanent carman mechanics' roster with seniority date as of the effective date of this agreement in the order with other men in which he completed 1160 days' experience as provided in Section First hereof, and if so electing shall forfeit his seniority as carman helper. The election by employee provided herein must be submitted to local management officer in writing, bearing his personal signature and witness thereto, and copy furnished to local committee.

8. On January 10, 1949, plaintiff completed his 1160 days, and within 15 days thereafter, in accordance with Agreement dated March 1, 1949, between defendant and Brotherhood of Railway Carmen of America, exercised his election, in writing, to be placed on the permanent Carman Mechanics Roster.

9. In June, 1949, the Bethlehem Car Inspectors Seniority Roster was posted reflecting seniority status effective March 1, 1949. On that list, there appeared the following names, with seniority in the order in which they appear:

WARREN SHUPP
STANLEY BRINKMAN
STEVE PAVLINSKY
PAUL W. DIEHL, JR.

10. Plaintiff states that if his employment had not been interrupted by his service in the Armed Forces, to wit: from April 15, 1943, to November 11, 1945, he

would have completed his 1160 days on June 1, 1946, and, therefore, claims seniority over the aforesaid Warren Shupp, Stanley Brinkman and Steve Pavlinsky.

11. Plaintiff requested of defendant that he be assigned the seniority status that would have been granted him, except for the interruption of employment caused by his service in the Armed Forces. Defendant refused, and still refuses to grant plaintiff the relative seniority standing to which he would have been entitled, if his employment had not been interrupted by his service in the Armed Forces as heretofore set forth in paragraph 10.

WHEREFORE, Plaintiff demands that defendant, the Lehigh Valley Railroad Company, be required to accord to the plaintiff the seniority to which he would have been entitled had his employment not been interrupted with the defendant by his services in the Armed Forces, as aforementioned, and that plaintiff be granted such other relief as is equitable and just.

/s/ GERALD A. GLEESON
Gerald A. Gleeson
United States Attorney

/s/ EDWARD A. KALLICK
Edward A. Kallick
Assistant United States Attorney

3. [Caption omitted]

Motion to Dismiss

The defendant moves the Court as follows:

1. To dismiss the action because the Complaint fails to state a claim against defendant upon which relief can be granted for the reasons among others:

A. Plaintiff was restored on November 12, 1945 to the position which he had left and remained in that position for more than one year;

B. The position of temporary car inspector was not one in which plaintiff was protected by the Selective Service and Training Act of 1940.

2. To dismiss the action because the Court has no jurisdiction over the subject matter of the Complaint for the same reasons.

Signed: HARRY E. SPROGELL

Harry E. Sprogell
2301 Packard Building
Philadelphia 2, Penna.
Attorney for Defendant

4. [Caption omitted]

Affidavit in Support of Defendant's Motion to Dismiss

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.

C. L. WAGNER, being duly sworn according to law, deposes and says as follows:

I am Chief of Personnel of Lehigh Valley Railroad Company, defendant in this case, and am duly author-

ized on its behalf to make this affidavit in support of a motion to dismiss the Complaint.

Attached to this affidavit are true and correct copies of the following documents pertinent to the plaintiff's rights:

Agreement effective November 1, 1942, between Lehigh Valley Railroad Company and System Federation No. 96, Railway Employees' Department, American Federation of Labor ("1942 Agreement")

Memorandum of Agreement dated August 29, 1944, between the same parties ("1944 Agreement")

Memorandum of Agreement dated March 1, 1949, between Lehigh Valley Railroad Company and Brotherhood Railway Carmen of America, one of the crafts forming System Federation No. 96.

After Paul W. Diehl, Jr., was employed by the defendant on June 24, 1942 the 1942 Agreement covered the status and rights of a number of crafts including that of carman. By the terms of the Agreement (Rule 27) reduction and expansion of working force in the crafts covered by the Agreement were to be accomplished on the basis of seniority. Among the crafts covered by the Agreement the carmen were divided for purposes of seniority into four subdivisions under the provisions of Rule 31, reading as follows:

"Seniority of employes in each craft covered by this agreement shall be confined to the point employed in the Maintenance of Equipment Depart-

ment and there shall be four subdivisions of the Carmen as follows:

Pattern Makers
Upholsterers
Painters
Other Carmen

"The seniority lists will be open to inspection and copy furnished the committee.

"Rosters will be compiled and posted in January of each year and will be open for correction for a period of sixty (60) days after being posted. If no exceptions are taken to a roster date within the sixty day period after it is first posted, the date will be considered as correct and not changed thereafter. Copy of the roster of each point will be mailed to Secretary of the Federated Shop Craft Committee."

Separate rosters were maintained for each sub-division of the carmen. Seniority on those rosters was determined by date of first entry on the roster. Seniority accumulated on one roster did not carry to another roster if a man caused his name to be changed from one to another. No man could maintain his name on more than one roster.

Among the special rules of the 1942 Agreement were certain rules for carmen of which Rule 120 "Qualifications" reads as follows:

"Any man who has served an apprenticeship or who has had four (4) years practical experience at carmen's work and who with the aid of tools, with

or without drawings, can lay out, build or perform the work of his craft or occupation in a mechanical manner, shall constitute a carman."

In addition to the group of fully qualified carmen there were certain subordinate classifications established by the 1942 Agreement including the classification of carman helper (Rule 123). In this sub-classification also a seniority roster was maintained. Seniority on this roster was governed by principles identical with those which have been stated above for the subdivision rosters. When Diehl was employed, his name was entered on the roster of carmen helpers and until further assignment he performed the duties of a carman helper.

On February 19, 1943, Diehl was assigned temporarily to perform the duties of a carman and continued to perform those duties until the time when he entered the Armed Forces. The phrase "Set-up" which is used by Diehl in paragraph 4 of the Complaint to describe his position as car inspector in railroad terminology has the same meaning as "temporarily advanced". The advancement or Set-up of Diehl and other carmen helpers was made because of war-time emergencies under agreement between the defendant and System Federation No. 96, evidenced by the 1944 agreement. This is the agreement referred to in paragraph 7 of the Complaint as covering seniority status of employees in the mechanical crafts. Paragraphs 4 and 11 of that Agreement read as follows:

"4. Helpers in any craft promoted to mechanics' positions subsequent to January 1, 1940, will

be placed on a desk seniority roster as of the date they were promoted; but this will not affect their helpers' seniority date; they to be carried on the regular helpers' roster as of their original date."

* * * *

"11. Question of disposition of helpers promoted to mechanics in any craft, subsequent to January 1, 1940, will be disposed of between the General Committee and the Management at the expiration of the present emergency."

During the performance of his duties as a carman helper temporarily set-up or advanced to perform the duties of a carman, Diehl and all other similarly Set-up remained on the roster of carmen helpers. Their names were not entered on the roster of carmen. They acquired no seniority as carmen and they had no right to be placed upon the carmen's roster. Diehl and all other carman helpers temporarily Set-up to perform the duties of carmen retained whatever seniority they had on the carmen helper roster.

When Diehl was re-employed on November 12, 1945, following his return from service in the Armed Forces he retained the precise position and seniority on the roster of carmen helpers which he had at the time when he had entered the Armed Forces and he was again temporarily advanced to perform the duties of a carman.

No carman helper Set-up or advanced temporarily since 1940 to perform temporarily the duties of a car-

man has acquired any seniority as a carman or been permitted to be listed on the carmen roster except under the provisions of the 1949 Agreement. The attention of the Court is particularly called to the following provisions of paragraph SECOND of the 1949 Agreement:

> "A carman helper, who has qualified as carman mechanic, as provided in Section First hereof, and is presently working on position of a temporary carman mechanic on the effective date of this agreement, shall be given the opportunity to make an election within fifteen days after the date of his being notified of having worked 1160 days as a temporary carman mechanic to be placed on the permanent carman mechanics' roster with seniority date as of the effective date of his agreement in the order with other men in which he completed 1160 days' experience as provided in Section First hereof, and if so electing shall forfeit his seniority as carman helper. The election by employee provided herein must be submitted to local management officer in writing, bearing his personal signature and witness thereto, and copy furnished to local committee."

Reference to 1160 days is to a definition by agreement between defendant and System Federation No. 96 of the four-year requirement of Rule 120 of the 1942 Agreement.

The provisions of paragraph SECOND of the 1949 Agreement as applied to carmen helpers whose 1160

days of service as temporary carmen mechanics have not been continuous is exactly the same whether the interruption was because of service in the Armed Forces or because of illness or because of leave of absence or for any other reason. Non-veteran employees whose service was interrupted by illness or leave of absence could not apply the time that they were absent against the 1160-day requirement.

/s/ C. L. WAGNER

Sworn to and subscribed before me this 18th day of January A.D. 1952.

(SEAL) /s/ GEORGE C. HAMM
Notary Public
Notary Public, State of New York.
Qualified in Queens County.
No. 41-6749300—Cert. Filed with N. Y. Co. Clerk and Register. Commission Expires March 30, 1952.

MEMORANDUM OF AGREEMENT COVERING SENIORITY STATUS OF EMPLOYEES IN THE MECHANICAL CRAFTS WHO HAVE BEEN PROMOTED TO MECHANICS FROM APPRENTICES, HELPERS AND COACH CLEANERS.

1. Helpers in any craft promoted to mechanic's position prior to January 1, 1940, will be placed on the mechanics' seniority roster as of the date they were first promoted to mechanics.

2. Apprentices who have not finished their apprenticeship and who have been advanced to perform mechanical work will be given their seniority as me-

chanics from the date of advancement, upon the completion of their four (4) years' apprenticeship.

3. Apprentices advanced to mechanics before the completion of their training course must keep up currently the lessons required of them in accordance with the rules governing apprentices.

4. Helpers in any craft promoted to mechanics' positions subsequent to January 1, 1940, will be placed on a desk seniority roster as of the date they were promoted; but this will not affect their helpers' seniority date; they to be carried on the regular helpers' roster as of their original date.

5. On account of the necessity to temporarily advance apprentices and helpers to mechanics' positions, it is agreed that the following procedure will be followed in making such advancements.

6. Regular apprentices, who have served three (3) years or more of their apprenticeship, will be advanced first.

7. Helper apprentices, who have served two (2) years or more of their apprenticeship, will be advanced next.

8. Regular apprentices, who have served two (2) years or more of their apprenticeship, and helper apprentices, who have served one (1) year or more of their apprenticeship, will be advanced next.

9. Qualified helpers having two (2) years or more experience as mechanics, or as helpers, will be advanced next.

10. Local Management and Local Committees will mutually agree on the employees to be advanced and demoted, subject to appeal to the General Chairman and the General Management.

11. Question of disposition of helpers promoted to mechanics in any craft, subsequent to January 1, 1940, will be disposed of between the General Committee and the Management at the expiration of the present emergency.

12. This Memorandum of Agreement supersedes all previous Memorandums of interpretations thereto, covering the promotion of apprentices and helpers.

FOR MECHANICAL CRAFTS SYSTEM FEDERATION NO. 96:

/s/ JOSEPH P. MCSPARRON
Int. Assn. Machinists

CHARLES GRAHAM
Int. Bro. Boilermakers, ISB&H

BRUCE L. JENNINGS
Int. Bro. Blacksmiths, D. F. & H.

LEON E. GORSKI
Sheet Metal Workers Int. Assn.

CARL K. SMITH
Int. Bro. Electrical Workers

GEO. E. SELLERS
Bro. Railway Carmen of America

JOHN J. WASLOSKI
President, System Federation No. 96

FOR LEHIGH VALLEY RAILROAD COMPANY:

/s/ J. N. HAINES
Asst. to General Manager

Dated August 29, 1944

MEMORANDUM OF AGREEMENT RELATING TO SENIORITY STATUS OF CARMEN HELPERS PROMOTED TO THE POSITION OF TEMPORARY CARMAN MECHANIC UNDER THE PROVISIONS OF MEMORANDUM OF AGREEMENT, DATED AUGUST 29, 1944 (GENERALLY KNOWN AS THE UPGRADING AGREEMENT) BETWEEN THE LEHIGH VALLEY RAILROAD COMPANY AND SYSTEM FEDERATION NO. 96, RAILWAY EMPLOYEES' DEPARTMENT, AMERICAN FEDERATION OF LABOR.

IT IS AGREED:

To decide the seniority status of carman helpers promoted to temporary carman mechanics under Memorandum of Agreement dated August 29, 1944, in accordance with the provisions of Item 11 thereof, reading:

> "Question of disposition of helpers promoted to mechanics in any craft, subsequent to January 1, 1940, will be disposed of between the General Committee and the Management at the expiration of the present emergency."

the following will apply:

FIRST:

A carman helper, who was upgraded under the provisions of the Memorandum of Agreement dated August 29, 1944, and who has worked a total of 1160 days at a temporary carman mechanic's rate of pay from date of first upgrading to temporary carman mechanic, which date shall be that subsequent to January 1, 1940, shall be considered eligible to accept or reject permanent carman mechanic seniority date in the following manner:

SECOND:

A carman helper, who has qualified as carman mechanic, as provided in Section First hereof, and is presently working on position of a temporary carman mechanic on the effective date of this agreement, shall be given the opportunity to make an election within fifteen days after the date of his being notified of having worked 1160 days as a temporary carman mechanic to be placed on the permanent carman mechanics' roster with seniority date as of the effective date of this agreement in the order with other men in which he completed 1160 days' experience as provided in Section First hereof, and if so electing shall forfeit his seniority as carman helper. The election by employee provided herein must be submitted to local management officer in writing, bearing his personal signature and witnessed thereto, and copy furnished to local committee.

THIRD:

A carman helper who becomes qualified as a carman mechanic, as provided in Section First hereof, subsequent to the effective date of this agreement, shall be entitled to elect within fifteen days after notice thereof to be placed on the permanent carman mechanics' roster with seniority date as of day following that on which he completed 1160 days' experience as provided in Section First hereof, and if so electing shall forfeit his seniority as carman helper. The election by employee provided herein must be submitted to local management officer in writing, bearing his personal signature and witness thereto, and copy furnished to local committee.

FOURTH:

A carman helper who, subsequent to January 1, 1940, was promoted to temporary carman mechanic and who presently is not working on a carman mechanic's position, having been demoted to carman helper position or furloughed as such, shall be given the opportunity to make an election within fifteen days after the effective date of this agreement of his desire to have his days of service rendered at a temporary carman mechanic's rate of pay subsequent to January 1, 1940 counted to qualify him for a carman mechanic's seniority date. If he so elects and has the required number of days to qualify as a carman mechanic as provided in Section First hereof, he shall be placed on the permanent carman mechanics' roster with seniority date as of the effective date of this agreement in the order with other men in which he completed 1160 days' experience as provided in Section First hereof, and if so electing shall forfeit his seniority as carman helper.

If he so elects, but does not have the required number of days to qualify as a carman mechanic, as provided in Section First hereof, his record of qualifying carman mechanic's days from January 1, 1940 to date shall be determined, and if in the future he adds to such record sufficient qualifying days of service rendered at a temporary carman mechanic's rate of pay to reach total of 1160 such days, he shall be entitled to make further election as to whether he desires a carman mechanic's seniority date in the same manner as provided in Section Third hereof.

Notices of the provisions of this section of this agreement shall be posted on the employees' bulletin boards

at all locations for period of fifteen days from the effective date of this agreement. These notices so posted shall be deemed to be full and sufficient notice to carman helpers as specified of the provisions of this agreement whereby they may, if they so desire, obtain carman mechanic's seniority date if they have the qualifying days of service rendered at a carman mechanic's rate of pay, or, if not, then to have the number of such qualifying days to be credited to them for future consideration, and not otherwise.

A carman helper coming under the provisions of this section must submit his request for consideration as provided herein to local management in writing, bearing his personal signature and witness thereto, and copy furnished to local committee within the time limit herein specified of fifteen days after the effective date of this agreement.

FIFTH:

A carman helper who upon qualifying as a carman mechanic under the provisions hereof and who does not elect to accept a permanent carman mechanic's seniority as provided in Section Second and Section Third hereof, shall be returned to his former position as a carman helper as soon as the local management and local committee can agree upon replacement to fill position he has been holding as a temporary carman mechanic.

SIXTH:

The provisions of this agreement shall apply to returning veterans who were promoted to temporary carman mechanics under the provisions of the agreement dated August 29, 1944, prior to their enlistment

or induction in the armed forces of the United States, under the Selective Training and Service Act of 1940 and the Selective Service Act of 1948, and when they returned to service and complete the remainder of the days' experience as provided in Section First of this agreement.

SEVENTH:

All of the provisions of the Memorandum of Agreement dated August 29, 1944 between the Lehigh Valley Railroad Company and System Federation No. 96, Railway Employees' Department, A. F. of L., to which the Brotherhood Railway Carmen of America was a party. Sections 1 to 12, inclusive, with the exception of Section 11 as modified by this agreement, shall continue in full force and effect for employees of the Carmen's Craft represented by Brotherhood Railway Carmen of America, until changed in accordance with the procedure required by the Railway Labor Act.

EIGHTH:

This Memorandum of Agreement shall be effective March 1, 1949 and shall continue in full force and effect until changed in accordance with the procedure required by the Railway Labor Act.

Accepted for:

BROTHERHOOD RAILWAY CARMEN OF AMERICA:

By /s/ GEORGE E. SELLERS,

General Chairman

Accepted for:

LEHIGH VALLEY RAILROAD COMPANY:

By /s/ C. L. WAGNER,

Chief of Personnel

LEHIGH VALLEY RAILROAD COMPANY

AGREEMENT BETWEEN THE LEHIGH VALLEY RAILROAD CO. AND SYSTEM FEDERATION NO. 96, EFFECTIVE NOVEMBER 1, 1942.

* * * *

Rule 27
Reduction of Forces.

When it becomes necessary to reduce expenses, the force at any point or in any department shall be reduced, seniority as per Rule 31 to govern; the employees affected to take the rate of the job to which they are assigned.

Four days' notice will be given employees affected before reduction is made and lists will be furnished the local committee.

In the restoration of forces, employees will be restored to service in accordance with their seniority if available within a reasonable time and shall be returned to their former positions if possible. The local committee will be furnished with a list of employees to be restored to service.

Employees restored to service will not be laid off again without the four days' advance notice provided in this rule.

In reducing the force the ratio of apprentices will be maintained.

* * * *

Rule 31.

Seniority.

Seniority of employees in each craft covered by this agreement shall be confined to the point employed in the Maintenance of Equipment Department and there shall be four subdivisions of the Carmen as follows:

Pattern Makers
Upholsterers
Painters
Other Carmen

The seniority lists will be opened to inspection and copy furnished the committee.

Rosters will be compiled and posted in January of each year and will be open for correction for a period of sixty (60) days after being posted. If no exceptions are taken to a roster date within the sixty day period after it is first posted, the date will be considered as correct and not changed thereafter. Copy of the rosters of each point will be mailed to Secretary of the Federated Shop Craft Committee.

* * * *

Rule 120.

Qualifications.

Any man who has served an apprenticeship or who has had four (4) years' practical experience at carmen's work and who with the aid of tools, with or without drawings, can lay out, build or perform the work of his craft or occupation in a mechanical manner, shall constitute a carman.

Rule 121.

Classification of Work.

Carmen's work shall consist of building, maintaining, dismantling (except all wood freight train cars), painting, upholstering and inspecting all passenger and freight cars, both wood and steel, planing mill, cabinet and bench carpenter work, pattern and flask making and all other carpenter work in shops and yards, except work generally recognized as bridge and building department work; carmen's work in building and repairing motor cars, lever cars, hand cars and station trucks; building, repairing, and removing and applying wooden locomotive cabs, pilots, pilot beams, running boards, foot and headlight boards; tender frames and trucks, pipe and inspection work in connection with air brake equipment on freight cars; applying patented metal roofing; operating punches and shears, doing shaping and forming; work done with hand forges and heating torches in connection with carmen's work; painting, varnishing, surfacing, decorating, lettering, cutting of stencils and removing paint (not including use of sand blast machine or removing vats); all other work generally recognized as painters' work under the supervision of the locomotive and car departments, except the application of blacking to fire and smoke boxes of locomotives in engine houses; joint car inspectors, car inspectors, safety appliances and train car repairers; oxy-acetylene, thermit and electric welding on work generally recognized as carmen's work; and all other work generally recognized as carmen's work.

* * * *

Rule 126.

Inspectors.

Men assigned to inspecting must be able to speak, write and read the English language, and have a fair knowledge of the A.A.R. (Association of American Railroads) rules and safety appliance laws, including the railroad company general rules.

Rule 127.

Inspectors and other carmen in train yards may be required to take record, for conducting transportation purposes, of seals, commodities or destination of cars in connection with carmen's duties.

* * * *

5. [Caption omitted]

Counter Affidavit

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF } ss.

PAUL W. DIEHL, JR., having been duly sworn according to law, deposes and says as follows:

This affidavit is submitted in answer to affidavit of C. L. Wagner filed on behalf of defendant.

Defendant's affidavit alleges that separate rosters were maintained for each subdivision of the carmen and that no man could maintain his name on more than one roster. This was true prior to the agreement between defendant and System Federation No. 96, dated August 29, 1944, which provided that "Helpers in any craft promoted to mechanics' positions subsequent to January 1, 1940, will be placed on a desk seniority roster as

of the date they were promoted; * * *." After that date my name was carried on the "desk seniority roster" of mechanics and the regular helpers roster.

The phrase "set-up" used in the Complaint denotes that I was advanced to a higher position, namely, that of carman mechanic, without having completed the requirements necessary to acquire seniority in that position. The position was the regular established position in the employ of the defendant and was not a temporary position. When advanced I began to acquire time towards the ultimate aim of acquiring seniority in the position. Rule 120 of the 1942 Agreement between defendant and System Federation No. 96 provided that "Any man who has served an apprenticeship or who has had four (4) years practical experience at carmen's work and who with the aid of tools, with or without drawings, can lay out, build or perform the work of his craft or occupation in a mechanical manner, shall constitute a carman." When "set-up" I began to acquire time towards the four years necessary under this rule.

When re-employed on November 12, 1945, I was re-employed in the position which I left to enter the armed forces, namely, that of "set-up Car Inspector." I was still in the position of acquiring time towards obtaining seniority as a carman mechanic.

Defendant has alleged that the provisions of paragraph Second of the 1949 Agreement are the same regardless of whether service was interrupted by service in the armed forces or by illness or leave of absence or any other reason. It is my contention that the provisions speak for themselves and are not ambiguous. I

have no information as to the treatment of non-veteran employees whose service was interrupted by conditions other than service in the armed forces, but the treatment afforded them is immaterial because ther seniority was not protected by the provisions of the Selective Service and Training Act while my seniority is so protected.

/s/ PAUL W. DIEHL, JR.
Paul W. Diehl, Jr.

Subscribed and sworn to before me this
14th day of October, 1952.

.....
Notary Public.

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6. [Caption omitted]

Order for Leave to Intervene

AND NOW, to wit, this 7th day of April A.D., 1952, upon motion of William M. Gerber, Esq., of Philadelphia, Pennsylvania, and Richard R. Lyman, Esq., of Toledo, Ohio, its attorneys, leave is hereby granted to System Federation No. 96 of the Railway Employees' Department of the American Federation of Labor, *et al.*, to intervene in the above entitled case, to file for its pleading to the Complaint of the plaintiff, a motion to dismiss said Complaint, and to participate fully in all further proceedings herein as a party defendant.

/s/ GUY K. BARD
J

7. [Caption omitted]

Motion of Intervening Defendants to Dismiss Complaint

Now come the intervening defendants System Federation No. 96 of the Railway Employees' Department of the American Federation of Labor, and Paul C. Yost, Warren A. Shupp, Stanley C. Brinkman, and Stephen J. Pavlinsky, and respectfully move the Court to dismiss the complaint of the plaintiff herein on the grounds of lack of jurisdiction of this Court over the subject matter and failure of said complaint to state a claim upon which relief can be granted, and in support of said motion state as follows:

1. It appears on the face of the complaint that upon his return from the armed forces plaintiff was restored to the position in the employ of defendant Railroad Company which he left to enter the armed forces, was retained in such position for more than one year following such restoration, and was not subsequently discharged therefrom.

2. Whatever reemployment rights plaintiff possessed by virtue of the Selective Training and Service Act of 1940, as amended, necessarily accrued upon his discharge from the armed forces and application to defendant Railroad Company for reemployment; and this action, brought more than six (6) years subsequent to plaintff's reemployment on November 11, 1945, is barred, insofar as it purports to assert such rights, by the applicable statute of limitations of the State of Pennsylvania.

3. It appears that prior to March 1, 1949, plaintiff possessed no right to demand and receive either a permanent position or any seniority status as carman (mechanic); that whatever rights he now possesses to such position and status necessarily spring from the agreement effective March 1, 1949, between the System Federation and defendant Railroad Company; and that this Court lacks jurisdiction of the subject matter over the claim asserted by plaintiff for the reason that exclusive jurisdiction of such claims is vested in the National Railroad Adjustment Board.

4. That the Selective Training and Service Act of 1940, as amended, did not entitle plaintiff, under the circumstances related in the complaint, to the position and seniority status of carmen (mechanic) which he claims.

/s/ WILLIAM M. GERBER
William M. Gerber
1203 Morris Bldg.
1421 Chestnut St.
Philadelphia, Penn.

/s/ RICHARD R. LYMAN
Richard R. Lyman
741 Nicholas Building
Toledo 4, Ohio

Of Counsel:
MULHOLLAND, ROBIE & HICKEY
741 Nicholas Building
Toledo 4, Ohio

8. [Caption omitted]

Motion for Summary Judgment

The plaintiff, Paul W. Diehl, Jr., by his attorneys, GERALD A. GLEESON, United States Attorney in and for the Eastern District of Pennsylvania, and Edward A. Kallick, Assistant United States Attorney in and for the said District, hereby moves the Court to enter summary judgment for the plaintiff, in accordance with the provisions of Rule 56(a) of the Rules of Civil Procedure, on the ground that the pleadings in this case and the affidavits filed by the parties hereto show that the plaintiff is entitled to judgment as a matter of law.

/s/ GERALD A. GLEESON
Gerald A. Gleeson
United States Attorney
/s/ EDWARD A. KALLICK
Edward A. Kallick
Assistant United States Attorney,
Attorneys for Plaintiff

---

9. [Caption omitted]

Affidavit in Support of Plaintiff's Motion for Summary Judgment

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF } ss.

PAUL W. DIEHL, JR., being first duly sworn, deposes and says:

I am the plaintiff in the above captioned case, and have personal knowledge of the facts herein set forth.

This affidavit is submitted in support of plaintiff's motion for summary judgment herein, for the purpose

of showing that there is in this action no genuine issue as to any material fact, and that the plaintiff is entitled to judgment as a matter of law.

I, Paul W. Diehl, Jr., was employed by the defendant, Lehigh Valley Railroad Company, on June 24, 1942, as a Car Repair Helper and acquired seniority as such under the rules, practices and customs of the company as of that date. In February 1943, I was promoted to the position of "Set-Up Car Inspector". In that position I performed all of the duties of a Car Inspector. This position was not a temporary position but a permanent position in the employ of the defendant company. The defendant company had entered into a collective bargaining agreement with System Federation No. 96, Railroad Employees' Department, American Federation of Labor, on November 1, 1942, which agreement covered the position of Car Inspector. Copy of said agreement is attached to affidavit of C. L. Wagner filed on behalf of the defendant company.

On April 15, 1943, while employed as Car Inspector by defendant railroad company, I was drafted into the military service of the United States.

While I was serving in the armed forces of the United States, defendant railroad entered into a collective bargaining agreement with System Federation No. 96, mentioned above, on August 29, 1944, which provided in part:

> "4. Helpers in any craft promoted to mechanics' positions subsequent to January 1, 1940, will be placed on a desk seniority roster as of the date they were promoted; but this will not affect

their helper's seniority date; they to be carried on the regular helpers' roster as of their original date.

"11. Question of disposition of helpers promoted to mechanics in any craft, subsequent to January 1, 1940, will be disposed of between the General Committee and the Management at the expiration of the present emergency."

The reference to mechanics' positions in paragraph 4 above included the position of Car Inspector, which I occupied when drafted into the military service of the United States. I was placed on the "desk seniority roster" referred to above as of February 1943, the date I was promotedto Car Inspector. The names of Warren Shupp, Stanley Brinkman, and Steve Pavlinsky were placed on said "desk seniority roster" subsequent to the date assigned to me.

On October 20, 1945, I was honorably discharged from the United States Air Force and returned to work for defendant railroad as a "Set-Up Car Inspector". Had it not been for my service in the armed forces, I would have completed 1160 days of service as a "Set-Up Car Inspector" on June 1, 1946. Warren Shupp, Stanley Brinkman and Steve Pavlinsky all completed 1160 days in such position after June 1, 1946. I completed 1160 days of actual service on the job as a "Set-Up Car Inspector" on January 10, 1949, the delay being caused solely by my absence in the military service of the United States. At that time no "Set-Up Car Inspector" had been placed on the carmen's seniority

roster but seniority was still retained on the helpers' seniority roster and the "desk seniority roster", on both of which rosters I was senior to the said Warren Shupp, Stanley Brinkman and Steve Pavlinsky.

On March 1, 1949, defendant railroad and System Federation No. 96, Railway Employees' Department, American Federation of Labor, entered into a collective bargaining agreement in pursuance of Section 11 of the 1944 agreement quoted above, which provided as to helpers who had been upgraded to the position of Carman Mechanic, which position is the same as that of "Set-Up Car Inspector", as follows:

> "FIRST
>
> A carman helper, who was upgraded under the provisions of the Memorandum of Agreement dated August 29, 1944 and who has worked a total of 1160 days at a temporary carman mechanic's rate of pay from date of first upgrading to temporary carman mechanic, which date shall be that subsequent to January 1, 1940, shall be considered eligible to accept or reject permanent carman mechanic seniority date in the following manner:
>
> "SECOND
>
> A carman helper, who has qualified as carman mechanic, as provided in Section First hereof, and is presently working on position of a temporary carman mechanic on the effective date of this agreement, shall be given the opportunity to make an election within fifteen days after the date of his being notified of having worked 1160 days as a

temporary carman mechanic to be placed on the permanent carman mechanics' roster with seniority date as of the effective date of this agreement in the order with other men in which he completed 1160 days' experience as provided in Section First hereof, and if so electing shall forfeit his seniority as carman helper. The election by employee provided herein must be submitted to local management officer in writing, bearing his personal signature and witness thereof, and copy furnished to local committee."

Pursuant to this agreement I was given the option of electing to become a Carman Mechanic and exercised this option within fifteen days after being notified of the election.

In June of 1949 the "Bethlehem Car Inspectors' Seniority Roster" was posted showing seniority status as of March 1, 1949. Said list showed seniority as follows:

Warren Shupp
Stanley Brinkman
Steve Pavlinsky
Paul W. Diehl

Warren Shupp was employed as a helper on September 5, 1942, and, without interruption by reason of military service, completed 1160 days as a Car Inspector on October 25, 1946. Stanley Brinkman was employed as a helper on April 19, 1943, and, without interruption by reason of military service, completed 1160 days as a Car Inspector on December 22, 1947. Steve Pavlinsky

was transferred from Easton as a "Set-Up Car Inspector" and, without interruption by reason of military service, completed 1160 days as a Car Inspector on July 18, 1948.

I requested the defendant railroad company to advance my name on the seniority list above that of Warren Shupp, the first man junior to me who completed his 1160 days of service as an upgraded Carman Mechanic subsequent to June 1, 1946. After considerable negotiation my request was refused. I then consulted the representative of the United States Department of Labor on July 5, 1949. Said representative communicated with the defendant railroad on July 13, 1949. Negotiations regarding my rights as a veteran under the Selective Service and Training Act continued between the representative of the United States Department of Labor and defendant railroad until the railroad finally denied my claim on January 2, 1951. In the meantime I had applied to System Federation No. 96, Railway Employees' Department, American Federation of Labor, the collective bargaining representative of the employees of defendant railroad, to file a grievance on my behalf, but the Union refused to do so on December 30, 1950. On February 26, 1951, my case was referred to the United States Attorney for the Eastern District of Pennsylvania by the representative of the United States Department of Labor, together with a letter from me requesting that legal proceedings

be instituted in my behalf. On November 28, 1951, this suit was brought.

/s/ PAUL W. DIEHL, JR.
Paul W. Diehl, Jr.

Subscribed and sworn to before me
this — day of ——, 1952.

.....
Notary Public

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10. [Caption omitted]

Opinion
Sur Motions to Dismiss

Before Kirkpatrick, Ch. J.

This case is before the Court on motions by the defendant and the intervening defendants to dismiss the complaint. Both sides have filed affidavits, but no substantial issue of fact is raised by them and they are in the main merely explanatory.

The question involved is whether the plaintiff, Diehl, a veteran, is entitled to seniority rights ahead of Yost, Shupp, Brinkman and Pavlinsky, the four intervening individual defendants, non-veterans.

At the time the controversy arose the seniority status of all five men was governed by a Union Agreement dated March 1, 1949, the pertinent sections of which provided in substance that carmen helpers, temporarily upgraded to carmen mechanics' positions (in which category all five of the men then were), could at their election become permanent carmen mechanics, provided they had worked a total of 1160 days at a temporary carman mechanic's rate of pay from the date of

first upgrading "with seniority date as of the effective date of this agreement in the order with other men in which (they) completed 1160 days' experience."

Taking the word "experience" in its ordinary meaning, the plaintiff completed his 1160 days of experience on January 10, 1949. If he had not been drafted and had been able to work continuously in his position of temporary carman mechanic, he would have completed the 1160 days on June 1, 1946. The other four men, the continuity of whose work was not interrupted by military service, all completed their 1160 days after June 1, 1946, but before January 10, 1949.

It is plain that the agreement did not intend that military service was to be counted as "experience" in determining seniority and, therefore, unless the agreement is in contravention of some provision of the Selective Training and Service Act of 1940, the employer's award of seniority to the intervening defendants was proper and the plaintiff's claim must fail.

The Act provides that a returing veteran who has left a position "other than a temporary position" shall be restored "to such position or to a position of like seniority, status and pay" and that he shall then "be considered as having been on furlough or leave of absence during his period of training and service" and shall be restored "without loss of seniority."

The first question is whether the plaintiff, when he returned to his employment, was restored without loss of seniority to the position which he had left. If he was, then unless the Union Agreement in some way operated to impair the seniority status, *to which he was entitled when he returned,* it cannot be held invalid,

there being nothing else in the Act which would upset it.

When the plaintiff left his employment to go into military service he was a carman helper temporarily upgraded to the position of carman mechanic. He had been first employed June 24, 1942, as a carman helper, was advanced to the position of "set-up car inspector," which is the same thing as a temporary carman mechanic, and while in that position was drafted on April 15, 1943. On that date he had seniority *as a carman helper,* running from the date of his first employment, but none at all * as a carman mechanic. Under the Union Agreements and rules, then and since in force, the two positions were entirely separate and distinct, so far as seniority was concerned. When a man moved from one such position to another, he lost all seniority acquired in the old job and had to begin at the bottom in the new one. Thus a man with twenty years continuous employment behind him might, if he accepted promotion to a new job, find himself in seniority behind men with ten years or even less. The retention of seniority rights is often considered preferable to promotion—a fact which accounts for the option to elect not to take the new job which was accorded to the men by the 1949 agreement.

When the plaintiff returned to work on November 11, 1945, he was restored to exactly the position which he had left, namely, "set-up car inspector", or tempo-

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* When the plaintiff was advanced to his temporary position as carman inspector, his name was placed on a "desk seniority roster", but all parties agree that this had no effect upon the seniority which he claims in this action.

rary carman mechanic. He lost no seniority which he had when he left, for he retained seniority as a carman helper dating from his first employment, June 24, 1942, being given seniority credit on that for the time he was in service. This was in exact compliance with the provision of the Act requiring that he be considered as having been on furlough or leave of absence.

When the plaintiff was drafted, the only right he had was that given by Rule 120 under the Union Agreement of 1942, namely, to be promoted to carman mechanic after four years (the equivalent of the 1160 days of the 1944 Agreement) of "practical experience at carmen's work", with seniority as of the day he became a carman mechanic. A temporary assignment as carman mechanic did not affect that right in any way. Nor did the Agreement of 1944, which merely provided that the question of seniority of such temporary employees should be postponed until a later agreement could be effected, as it was, in 1949. There was, of course, the possibility, maybe probability, that he would be able to work continuously and acquire the necessary experience ahead of men who began to get theirs later, but the protection of the Act extends only to employees' rights and was not intended to cover their expectations. To restore the veteran to the rights which he had when he entered military service and which would be lost unless protected is something that the law can do and does, but to restore or compensate or give the equivalent of lost opportunities is something which the law wisely does not attempt.

When the plaintiff was drafted, he had at most a reasonable expectation that he would get on the permanent seniority roster of carman mechanic ahead of the men who are now intervening defendants—an expectation which might have been realized if he had not been in military service. But the Court can give him the advanced seniority which he claims in this action only by a ruling which would mean that no Union Agreement regulating seniority, no matter how long after the veteran's return it is made, is valid unless it provides that military service shall be taken as the equivalent of experience in the craft. The great weight of authority is to the contrary. See *Fries* v. *Pennsylvania Railroad Co.*, 195 F. 2d 445; *Zaversnik* v. *Union Pacific Railroad Co.*, 95 F. Supp. 209; *Seattle Star, Inc.* v. *Randolph*, 168 F. 2d 274.

The complaint may be dismissed.

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11. [Caption omitted]

Judgment

BEFORE KIRKPATRICK, *J.*

AND NOW, to wit: November 12th, 1952, in accordance with Opinion of the Court, it is ORDERED that the above action be and the same is hereby Dismissed.

BY THE COURT:

ATTEST:

/s/ J. A. COMEY
Deputy Clerk

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41

No. 11022

In the United States Court of Appeals For the Third Circuit

PAUL W. DIEHL, JR., *Appellant*

v.

LEHIGH VALLEY RAILROAD COMPANY, ET AL.

Appeal from the United States District Court for the Eastern District of Pennsylvania

JOINT APPENDIX TO SEPARATE BRIEFS OF APPELLE LEHIGH VALLEY RAILROAD COMPANY AND OF APPELLES SYSTEM FEDERATION NO. 96 OF THE RAILWAY EMPLOYES' DEPARTMENT, A. F. OF L., AND PAUL C. YOST, WARREN A. SHUPP, STANLEY C. BRINKMAN AND STEPHEN J. PAVLINSKY

HARRY E. SPROGELL
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Toledo 4, Ohio
Attorneys for Appellees System Federation No. 96 of the Railway Employes' Department, A. F. of L., and Paul C. Yost, Warren A. Shupp, Stanley C. Brinkman and Stanley J. Pavlinsky

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JUN 20 1952

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1. Rules 32; 40, 41, 42, 43; 123; 134, 135, 136, 137, 138, 139; 142 of agreement between the Lehigh Valley Railroad Company and System Federation No. 96 effective November 1, 1942, attached to affidavit of C. L. Wagner (which affidavit together with certain other rules of said agreement appear at pages 7a-24a of Appendix to brief for the appellant herein) 1a

2. Counter affidavit opposing plaintiff's motion for summary judgment 9a

1. Rules 32; 40, 41, 42, 43; 123; 134, 135, 136, 137, 138, 139; 142 of agreement between the Lehigh Valley Railroad Company and System Federation No. 96 effective November 1, 1942, attached to affidavit of C. L. Wagner (which affidavit together with certain other rules of said agreement appear at pages 7a-24a of Appendix to brief for the appellant herein).

Rule 32

Assignment of Work

None but mechanics or apprentices regularly employed as such shall do mechanics' work as per special rules of each craft, except foremen at points where no mechanics are employed.

This rule does not prohibit foremen in the exercise of their duties to perform work.

At points where there is not sufficient work to justify employing a mechanic of each craft, the mechanic or mechanics employed at such points will, so far as capable, perform the work of any craft that may be necessary.

This agreement will not be construed to prevent engineers, firemen, cranemen and operators of steam shovels, ditchers, clam shells, wreck outfits, pile drivers and other similar equipment from making any repairs to such equipment they are qualified to perform when required on line of road.

* * * *

Rule 40

Apprentices

All apprentices must be able to speak, read and write the English language and understand at least the first four rules of arithmetic. Applicants for regular apprenticeship

shall be between 18 and 23 years of age, and, if accepted, shall serve four (4) years of 290 days each calendar year. If retained in the service at the expiration of their apprenticeship, they shall be paid not less than the minimum rate established for journeymen mechanics of their respective crafts. Apprentices shall not work on oxy-acetylene, thermit, electric or other welding processes until they are in the last year of their apprenticeship. In selecting helper apprentices, ability and seniority will govern and selections will be made in conjunction with the respective shop craft committee.

Rule 41

All apprentices must be indentured and shall be furnished with a duplicate indenture by the company, who will also furnish every opportunity possible for the apprentice to secure a complete knowledge of the trade. No apprentice will be started at points where there are not adequate facilities for learning the trade.

FORM OF INDENTURE

This will certify that .....
was employed as.....apprentice by the
.....Railroad at
.....on .....19...., to
serve four years, a minimum of 290 days each.

.....
(Title of officer in charge)

SERVICE PERFORMED DURING
APPRENTICESHIP:

.....
.....
.....

This will certify that on.....19..,
..... completed the course
of apprenticeship specified above and is entitled, if employed by the ..... Railroad to

the rates of pay and conditions of service of.....

.....

(Title of officer in charge)

NOTE:—The above form is to be used both for regular and helper apprentices. (Helper apprentices to serve three (3) years).

Rule 42

The ratio of apprentices in their respective crafts shall not be more than one to every seven mechanics. This not to apply to Pattern and Upholstery Shops.

Two apprentices shall not be worked together as partners.

The distribution of apprentices among shops where general repairs are made on the division shall be as nearly as possible in proportion to the mechanics in the respective trades employed therein.

In computing the number of apprentices that may be employed in a trade on a division the total number of mechanics of that craft employed on the division will be considered.

If within six months a regular apprentice and within three months a helper apprentice shows no aptitude to learn the trade he will not be retained as an apprentice.

An apprentice shall not be dismissed except for just and sufficient cause, before completing his apprenticeship.

Regular apprentices shall not be assigned to work on night shifts, and shall not be allowed to work overtime during the first three (3) years of his apprenticeship.

If an apprentice is retained in service upon completing the apprenticeship, his seniority rights as a mechanic will date from the time of completion of apprenticeship.

Preference will be given to sons of employes in the selection of apprentices up to 80 percent of the number employed.

The number of special apprentices permitted shall not exceed eight (8) at any time; they shall be selected from men between the ages of 18 and 30 years who have had education of such character as to provide them with exceptional qualifications for this nature of service. They shall serve three (3) years of 290 days each calendar year or its equivalent.

They shall receive training in the various departments and in the different classes of work of the crafts in the Maintenance of Equipment Department and may be moved at the discretion of the Management.

If retained in service at the completion of the three (3) year course, the apprentice may choose the craft he desires employment in and shall receive a special rate for a period of one (1) year, at the expiration of which he shall be classified and receive the minimum rate of the craft employed in.

Special apprentices shall receive not less than the rate paid helper apprentices during their first three years; this to apply to such apprentices employed after the effective date of this agreement.

Except as provided for in this rule, special apprentices shall be governed by the rules of this agreement.

Rule 43

(a) An apprentice who fails to maintain the study schedule requirements of two new examinations each month, becomes delinquent in any month in which he is either one or two examinations behind schedule, and he no longer has a perfect record. However such apprentice is still considered in good standing and can clear his delinquency by submitting the required number of new examinations to put himself on schedule again.

(b) An apprentice who accumulates two uncleared delinquencies (two separate months) is still considered in good standing and can clear his delinquencies by submitting the required number of new examinations to put himself on schedule again.

(c) An apprentice who accumulates three uncleared delinquencies (three separate months), is subject to removal from the service after proper investigation is held, as provided for by Rule 37.

(d) An apprentice who removed himself from the service for cause as provided in paragraph (c) after proper investigation is held, as provided for by Rule 37, is given one more opportunity to clear his record under the following conditions:

(1) Within fifteen (15) days after removal from the service such apprentice must personally bring to the officer in charge of the shop point where such apprentice is working a sufficient number of new examinations to put himself on schedule again and in addition, reworked examinations on all lessons on which such apprentice has previously failed to attain a passing grade. These examinations must be in an unsealed and properly stamped envelope or container, so that the officer in charge may inspect the examinations.

(2) After complying with the requirements of item (1) such apprentices will then be reinstated.

(e) If an apprentice accumulates three uncleared delinquencies a second time, he will be given an investigation as provided for by Rule 37, and if it is proven that such apprentice was three months delinquent a second time, he will be dismissed as an apprentice.

(f) In connection with the application of paragraphs (c), (d) and (e), it is understood that an apprentice may be excused for failure to live up to the study schedule requirements of his technical training on account of sickness or any other legitimate cause beyond his control. The Apprentice Instructor, in conjunction with the Local Committee, will investigate such cases and will make their recommendations to the supervisory officer as to whether an apprentice should be excused.

(g) An apprentice who is delinquent in his studies when completing his apprenticeship, will not receive his diploma until after he has cleared his record.

(h) Apprentices leaving the service before completing their apprenticeship will be required to return the complete drawing outfit furnished by the Company, to the officer in charge at his station before receiving the final pay due him.

• • • •

Rule 123

Carmen Helpers

Employes regularly assigned to help carmen and apprentices, employes engaged in washing and scrubbing the inside and outside of passenger coaches preparatory to painting, cleaning and dyeing cushions; seat backs, curtains, etc.; washing and scrubbing freight cars; cleaning car carpets, draperies, curtains, etc., removing of paint and varnish on other than passenger cars preparatory to painting, car oilers and packers, operators of bolt threaders, nut tappers, drill presses and punch and shear operators (cutting only bar stock and scrap) heating and holding on rivets, striking chisel bars, side sets, and backing out punches, using backing hammer and sledges in assisting carmen in straightening metal parts of cars, rebrassing of cars in connection with oilers' duties, coating and cleaning journals, repairing and fitting up steam and air hose, assisting carmen in erecting scaffolds, assisting dismantling cars, attending tool room; sand blasting; grinding drills and edge tools; and all other work generally recognized as carmen's helpers' work shall be classed as helpers.

• • • •

Rule 134

Apprentices

Regular apprenticeships will be established in all branches of the trade. Apprentices shall be governed by

the general rules governing apprentices. They will be given an opportunity to learn the trade.

Rule 135

Helper Apprentices

Fifty percent of the apprentices shall be selected from carmen's helpers who have had not less than two (2) years experience at the point employed at the time application for apprenticeship is made. Helper apprentices shall not be over 35 years of age and will serve three (3) years, a minimum of 290 days each service year. Helper apprentices shall be governed by the same rules as regular apprentices. If after the first three (3) months they do not show an aptitude to learn the trade they will not be retained as helper apprentices.

Rule 136

Painter Apprentice

Regular apprentices—Division of time for painter apprentices:

The following schedule for regular apprentices, painter, showing the division of time on the various classes of work, is designed as a guide and will be followed as closely as the conditions will permit:

6 months—Freight car painting.

6 months—Color room, mixing paint.

6 months—General locomotive painting.

12 months—Brush work, passenger equipment.

18 months—Lettering, striping, varnishing, and such laying out and designing as the shop affords.

Rule 137

Schedule of Work Painter Helper Apprentice

Helper apprentices—Division of time for painter apprentices:

The following schedule for helper apprentices, painter, showing the division of time on the various classes of work, is designed as a guide, and will be followed as closely as the conditions will permit:

4 months—Freight car painting.

4 months—Color room, mixing paint.

4 months—General locomotive painting.

10 months—Brush work, passenger equipment.

14 months—Lettering, striping, varnishing and such laying out and designing as the shop affords.

Rule 138

Regular Apprentices, Carmen

The following schedule for regular apprentices, showing the division of time on the various classes of work, is designed as a guide and will be followed as closely as the conditions will permit. Where sufficient passenger car department work is not available without exceeding the regular ratio of apprentices in the passenger car department, apprentices will complete their apprenticeship in the freight car department.

18 months—General freight work, wood and steel.

6 months—Air brake work.

6 months—Mill machine work.

18 months—General coach work, wood and steel.

Rule 139

Helper Apprentice, Carmen

The following schedule for helper apprentices, showing the division of time on the various classes of work, is designed as a guide and will be followed as closely as the conditions will permit. Where sufficient passenger car department work is not available, without exceeding the regular ratio of apprentices in the passenger car department, apprentices will complete their apprenticeship in the freight car department.

12 months—General freight work, wood and steel.
6 months—Air brake work.
6 months—Mill machine work.
12 months—General coach work, wood and steel.

* * * *

Rule 142

Miscellaneous

Except as provided for under the special rules of each craft, the General Rules shall govern in all cases.

2. [Caption Omitted]

Counter Affidavit Opposing Plaintiff's Motion for Summary Judgment

STATE OF NEW YORK
COUNTY OF NEW YORK ss.

C. L. WAGNER, being duly sworn according to law deposes and says as follows:

I am Chief of Personnel of Lehigh Valley Railroad Company, defendant in this case, and am duly authorized on its behalf to make this affidavit in opposition to the plaintiff's motion for summary judgment. I have personal knowledge of the facts set out below.

It is not accurate to say that the "desk seniority roster" on which plaintiff's name was entered pursuant to the agreement dated August 29, 1944 also carried the names of qualified mechanics. It did not. Mechanics, i.e. carmen were carried on their own roster—the carmen's roster. The only persons placed upon the "desk roster" were unqualified persons like the plaintiff who by reason of the emergency performed a carman's work.

I am advised by counsel that I cannot express an opinion whether the plaintiff's position as a set-up car inspector was temporary or permanent because to do so would be

to express a conclusion and not a fact. The following facts concerning the plaintiff's position as a set-up car inspector were true, however: his name was not entered on any roster with the name of a qualified carman mechanic. He had no seniority and was not in position to acquire any seniority as a carman mechanic prior to the 1949 agreement. He had no right to become a carman mechanic prior to the 1949 agreement. He performed the work of a carman mechanic and was entered upon the "desk seniority roster" only because of emergencies; had the emergency not prevailed neither of these events would have occurred. The phrase describing his "set-up" in railroad terminology means "temporarily advanced."

It is not accurate to say that the plaintiff was "senior" to Shupp and others on the "desk seniority roster". His name was entered there earlier than the names of Shupp and others but seniority has no meaning except as may be supplied by a labor agreement and the agreements referred to in my original affidavit were the only agreements under which the plaintiff ever could have acquired any seniority whatever.

/s/ C. L. Wagner

Sworn to and subscribed before me this 16th day of October, A.D. 1952.

(seal) /s/ George C. Hamm
Notary Public

Notary Public, State of New York.
Qualified in Queens County.
No. 41-6749300—Certs. Filed, etc.

[fol. 53] IN UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,022

PAUL W. DIEHL, JR., Appellant,

v.

LEHIGH VALLEY RAILROAD COMPANY (DEFT.), SYSTEM FEDERATION NO. 96 OF THE RAILWAY EMPLOYEES DEPARTMENT OF LABOR, and Paul C. Yost, Warren A. Shupp, Stanley C. Brinkman and Stephen J. Pavlinsky (Intervening Defts.)

Appeal from the United States District Court for the Eastern District of Pennsylvania

Argued September 15, 1953

Before Biggs, Chief Judge, and Goodrich and Hastie, Circuit Judges

OPINION OF THE COURT—Filed March 3, 1954

By BIGGS, Chief Judge:

This appeal requires a construction of Section 8 of the Selective Training and Service Act of 1940, as amended.[1]

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[1] See 54 Stat. 890, 56 Stat. 724, 58 Stat. 798, 60 Stat. 341. See 50 U.S.C.A. App. § 308. The basic statute will be found at 54 Stat. 885. As amended the Selective Training and Service Act expired in its major part on March 31, 1947. Section 8, however, is saved indefinitely. See Act of June 29, 1946, 60 Stat. 341, § 7. Section 8(c) provides: "Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave

[fol. 54] On June 24, 1942, Diehl was employed as a "car-man helper" by the Lehigh Valley Railroad Company. A carman helper's job fell into a sub-class of a division of the craft of "car-men" under a collective bargaining agreement executed by Diehl's union and the railroad. On February 19, 1943, Diehl was promoted to a job of "set-up car-man inspector," the equivalent for our purposes of a "temporary car-man mechanic."

On April 15, 1943, Diehl entered the armed forces. On August 29, 1944, Diehl's union and the railroad entered into an agreement which provided that the seniority status of car-man helpers promoted to temporary car-man mechanics would be determined by the union and the railroad at the expiration of the war emergency. On October 20, 1945, Diehl received an honorable discharge and on November 11, 1945, he re-entered the railroad's employment as a temporary car-man mechanic.

On March 1, 1949, a supplemental contract was entered into between the union and the railroad. The pertinent provision of this contract provided that "A car man helper, who has qualified as a car man mechanic . . . and is presently working on position of a temporary car man mechanic

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of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration."

The provisions of Section 9(c)(1) of the Selective Service Act of 1948, Act of June 24, 1948, 62 Stat. 615, amended and renamed the "Universal Military Training and Service Act" by the Act of June 19, 1951, 65 Stat. 75, 50 U.S.C.A. App. § 459, are identical with those of Section 8(c) of the Selective Training and Service Act but Section 9(c)(2) of the Selective Service Act of 1948 provides: "It is hereby declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment."

on the effective date of this agreement [March 1, 1949], shall be given the opportunity to make an election within 15 days after the date of his being notified of having worked 1160 days as a temporary car man mechanic to be placed [fol. 55] on the permanent car man mechanics' roster with seniority date as of the effective date of this agreement *in the order with other men in which he completed 1160 days' experience* . . . and if so electing shall forfeit his seniority as a car man helper." (Emphasis added.)

Diehl would have completed 1160 days' experience on June 1, 1946, if his employment by the railroad had not been interrupted by his war service. He actually completed 1160 days' experience on January 10, 1949. The four individual appellees completed their 1160 days' experience after June 1, 1946, but before January 10, 1949. The four individual appellees were put on the seniority roster ahead of Diehl purportedly in accord with the quoted provisions of the supplemental contract of March 1, 1949. On November 28, 1951, Diehl filed the suit at bar to have himself placed ahead of the four individual appellees on the seniority roster. The court below dismissed the complaint [2] and the appeal at bar followed.

We need not concern ourselves with the so-called one year limitation proviso in the last sentence of Section 8(c), for the contract of August 29, 1944 provided, as has been said, that the seniority status of car-man helpers promoted to temporary car-man mechanics should be determined by the union and the railroad at the expiration of the war emergency. Diehl was in the armed forces at the time the agreement referred to was made and he was reemployed by the railroad before the supplemental agreement of March 1, 1949 had been executed. He contends that he is entitled to the seniority status as a car-man mechanic that he would have achieved except for the interruption of his employment by his military service. He cites Section 8(c), in particular the phrases which state that the returning veteran must be restored to his employment "without loss of seniority" and gain the "benefits . . . offered by the employer pursuant to established rules and practices re-

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[2] No opinion reported for publication.

[fol. 56] lating to employees on furlough or leave of absence. . . ." Diehl relies on the "escalator" rule cited in such decisions as Fishgold v. Sullivan Drydock and Repair Corp., 328 U. S. 275 (1946); Trailmobile Company v. Whirls, 331 U. S. 40 (1947); Aeronautical Lodge v. Campbell, 337 U. S. 521 (1949); and Oakley v. Louisville & N. R. Co., 338 U. S. 278 (1949).[3] The appellees in support of their position cite other language of Section 8(c), viz, that the returning veteran "shall be considered as having been on furlough or leave of absence" and put a quite different emphasis than does Diehl upon the decisions of the Supreme Court of the United States, of this and of other courts. Both Diehl and the appellees cite legislative history in support of their positions but that history does not illuminate the problem confronting us.

We decide first that the provisions of Section 8 of the Selective Training and Service Act govern. These were preserved when the rest of the Act was repealed. The provisions of Section 8(c) of the Selective Training and Service Act and those of Section 9(c)(1) of the Selective Service Act of 1948 (now known as the Universal Military Training and Service Act) are identical. The statements in Section 9(c)(2) of the latter Act, beginning, "It is hereby declared to be the sense of the Congress . . . [that the returning veteran] shall be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously. . . ."[4] constituted a declaration by Congress as to the meaning

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[3] In Fishgold v. Sullivan Drydock & Repair Corp., 328 U. S. at pp. 284-285, it was said:

"Thus he [the returning veteran] does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war . . .

". . . He acquires not only the same seniority he had; his service in the armed services is counted as service in the plant so that he does not lose ground by reason of his absence."

[4] The language of Section 9(c)(2) is quoted in note 1 *supra.*

of the provisions of Section 8(c) of the Selective Training [fol. 57] and Service Act and of Section 9(c)(1) of the Universal Military Training and Service Act. Section 9 (c)(2) is a restatement of the escalator doctrine of Fishgold and similar decisions. The provisions of Section 9(c)(1) of the Universal Military Training and Service Act and, therefore, those of Section 8(c) of the Selective Training and Service Act, seem to be at variance with the terms of Section 9(c)(2). It is our duty to reconcile these apparently conflicting pronouncements if we can. In so stating we are not unmindful of the fact that Diehl's rights are to be tested under Section 8 of the Selective Training and Service Act of 1940 rather than under Section 9 of the Universal Military Training and Service Act. But we cannot believe that Congress, having employed words identical in Section 9(c) of the Universal Military Training and Service Act with those of Section 8(c) of the Selective Training and Service Act of 1940, intended any substantial change.

We think, therefore, that we cannot fairly avoid consideration of the provisions of Section 9(c)(2) of the Universal Military Training and Service Act. The latest decisions of the Supreme Court respecting the rights of the returning veteran are embodied in the Aeronautical Lodge and the Oakley decisions, *supra*. In Aeronautical Lodge the Supreme Court resolved a conflict between this court and the Court of Appeals for the Ninth Circuit, referring particularly to our decision in Gauweiler v. Elastic Stop Nut Corp., 162 F. 2d 448 (1947). In that case we held that by reason of a collective bargaining agreement employees, who had been elected union officers, were entitled to a seniority status higher than that of a returning veteran, the collective bargaining agreement having been executed during the veteran's service in the armed forces. This was the problem which was before the Supreme Court and the Court of Appeals for the Ninth Circuit in Aeronautical Industrial Dist. Lodge 727 v. Campbell, 169 F. 2d 252 (1948). In reversing the ruling of the Ninth Circuit in Aeronautical Lodge Mr. [fol. 58] Justice Frankfurter made it clear that in enacting Section 8 of the Selective Training and Service Act Congress was not creating a seniority system for veterans but was recognizing seniority systems created by collective

bargaining agreements, save where their provisions were discriminatory in respect to a returning veteran. See 337 U.S. at pp. 526-527. In the Oakley case, *supra*, Mr. Justice Burton stated that the position to which the returning veteran must be restored was one which "on the moving escalator of terms and conditions . . . would be comparable to the position which he would have held if he had remained continuously in his civilian employment.", citing Fishgold, Aeronautical Lodge and Trailmobile. See 338 U.S. at 283. The Oakley case was decided in 1949 after the enactment of the Selective Service Act of 1948. The language employed by the Supreme Court is substantially similar to that used in Section 9(c)(2) of that Act. See note 1, *supra*.

By the decision in Aeronautical Lodge, as in our Gauweiler case, a special *class* was carved out for employees who became union officials and these were given seniority over returning veterans who were not designated to official union posts. This was done because of the terms of collective bargaining agreements and existing seniority systems. But if we apply literally the test supplied by Oakley we must advance Diehl above the four individual appellees for only so will his position become comparable to that "which he would have held if he had remained continuously in his civilian employment". If we adopt this course we must disregard the provisions of Section 8(c) of the Selective Training and Service Act and of the Selective Service Act of 1948 (the Universal Military Training and Service Act) which provide that the returning veteran "shall be considered as having been on furlough or leave of absence" and shall be "so restored" to his position without loss of seniority. There is a very palpable difference between "furlough" and "leave of absence" and "continuous em- [fol. 59] ployment".[5] If we are to follow the "sense of the

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[5] In Fishgold v. Sullivan Drydock and Repair Corporation, 154 F. 2d 785, 788 (2d Cir.), affirmed 328 U.S. 275 (1946). Judge Learned Hand put this issue succinctly as follows:

"Subdivision (c) confirms the intention so disclosed. As subsection B reads, it would probably be understood to

Congress" as stated by it in Section 9(c)(2) of the Selective Service Act of 1948 (the Universal Military Training and Service Act) and apply literally the interpretation of Section 8(c) of the Selective Training and Service Act in the Oakley case, we must treat "on furlough" and "leave of absence" as the equivalent of "continuous employment".

We cannot reconcile the irreconcilable. Congressional intent as expressed in the actual words of a statute must, we think, be held paramount to an express Congressional interpretation of that statute even in an immediately following clause. It must also be borne in mind that in the Oakley case the Supreme Court was concerned primarily with the application of the so-called one year limitation for the protection of the veteran embodied in the last sentence of Section 8(c). This was the substantial issue before that tribunal for decision. There is no Supreme Court decision which rules the precise question before us. But see the decision of the Court of Appeals for the Seventh Circuit in Fries v. Pennsylvania R. Co., 195 F. 2d 445 (1952). In the instant case the supplemental agreement of March 1, 1949 creates the escalator upon which Diehl must rise to seniority. *Non constat* but that terms of that agreement which are discriminatory to the veteran must be disregarded. But the requirement of 1160 days' experience to be applied in the order in which Diehl completed them "with other men", including the four individual appellees, are [fol. 60] not discriminatory for Diehl is treated precisely as are other workmen in his *class* or working group. The decision of the court below fitted Diehl precisely into the

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restore the veteran only to that same position which he held when he was inducted. That was, however, thought to be unfair; for while he was in the service, there was likely to be such changes in the personnel that when he came back, he might find himself junior to those over whom he had had priority when he left. To remedy this, by an amendment made while the bill was in Congress, he was given the same status that he would have had, if he had been 'on furlough or leave of absence' while he was in the service. How far that differed from his position, had he remained actively at work, does not appear; but clearly the amendment presupposed that a difference there might be."

seniority system created by the March 1, 1949 agreement. He is dealt with on a parity with other employees who are non-veterans. To put him above the four individual appellees would seem to award him a kind of superseniority not contemplated by any statute.

Accordingly, the judgment of the court below will be affirmed.

[fol. 61] In United States Court of Appeals for the Third Circuit

No. 11,022

Paul W. Diehl, Jr., Appellant,

vs.

Lehigh Valley Railroad Company, System Federation No. 96 of the Railway Employees Department of the American Federation of Labor, and Paul C. Yost, Warren A. Shupp, Stanley C. Brinkman and Stephen J. Pavlinsky

On Appeal from the United States District Court for the Eastern District of Pennsylvania

Present: Biggs, Chief Judge, and Goodrich and Hastie, Circuit Judges.

Judgment—Filed March 3, 1954

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

March 3, 1954.

[File endorsement omitted.]

[fol. 62] Clerk's Certificate to foregoing transcript omitted in printing.

[Fol. 63-65] SUPREME COURT OF THE UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—Filed May 20, 1954

Upon consideration of the application of counsel for petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 31, 1954.

Harold A. Burton, Associate Justice of the Supreme Court of the United States.

Dated this 22nd day of May, 1954.

[fol. 66] [File endorsement omitted.]

[fol. 67] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

No. 246

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed October 25, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

DEC 7 1954
HAROLD B. WILLEY, C

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 246

PAUL W. DIEHL, JR.,
Petitioner,

v.

LEHIGH VALLEY RAILROAD CO. ET AL.,
Respondents

BRIEF FOR PETITIONER

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 246

PAUL W. DIEHL, JR.,
Petitioner,

v.

LEHIGH VALLEY RAILROAD COMPANY, ET AL.,
Respondents

BRIEF FOR PETITIONER

Opinions Below

The opinion of the District Court granting defendants' motions to dismiss the complaint (R. 35a) is reported at 22 CCH Labor Cases, § 67,375. The opinion of the Court of Appeals affirming the judgment of the District Court (R. 53) is reported at 211 F. 2d 95.

Jurisdiction

The judgment of the Court of Appeals was entered on March 3, 1954 (R. 60). This Court extended to July 31, 1954 the time for filing the petition (R. 61), and it was filed July 29, 1954. Jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Statute Involved

The pertinent portions of Section 8 of the Selective Training and Service Act of 1940, 54 Stat. 890, 50 U. S. C. App. 308, are set forth in the Appendix.

Question Presented

Whether the "continuous employment" standard (which this Court has said the statute establishes) permits a veteran, who after returning from military service met a qualification test for promotion (from which seniority dated in the higher job), to be passed in seniority standing by those previously junior to him who because they remained continuously employed were able to meet the test during his absence but after the date he would have met it had military service not interrupted his employment.

Statement

This action was brought under Section 8 of the Selective Training and Service Act of 1940, as amended, by a veteran, reinstated in his former employment, to compel his employer to place him in the seniority position he would have occupied had military service not interrupted his civilian employment. (R. 3a-6a). The collective bargaining agent for the employees (including the veteran), System Federation No. 96 of the Railway Employees' Department, A. F. of L. (hereafter called "the union"), and the non-veteran employees affected intervened as defendants. (R. 26a). Defendants filed no answers, but moved to dismiss the complaint. (R. 7a-27a). The district court's judgment dismissing the complaint (R. 35a) was affirmed by the court below. (R. 53).

When plaintiff entered the armed forces, on April 15, 1953, he was working as a "set-up" carman mechanic, or inspector, i. e. he was a carman helper who had been as-

signed the duties of a carman but was not yet fully qualified to be a carman. (R. 10a, 25a). This up-grading of helpers was required by the wartime shortage of carmen. (R. 10a). The positions of carman helper, "set up" carman, and carman are within the same craft and at all times were governed by the same collective bargaining agreements. (R. 10a-23a). These "set-up" carmen who completed 1160 days of work at carmen's duties were promoted to carmen; the order in which they completed the 1160 days of works determined their seniority order as carmen.[1] (R. 16a-20a). This seniority order in turn governs certain preferences in their employment, such as order of layoffs and recall to work.

Plaintiff Diehl was honorably discharged from military service and duly returned to his employment with the railroad as a "set up" carman. Subsequently, on January 10, 1949, he completed the 1160 days of work. (R. 5a). If he had continued on the job, without interruption for military service, he would have completed the 1160 days on June 1, 1946. (R. 6a). Four non-veterans who had begun work as upgraded carmen later than Diehl continued working during his absence in military service and thus were able to complete the 1160 days prior to January 10, 1949, the date Diehl completed the requirement, but after June

[1] By mutual consent of the union and railroad, the disposition of seniority for "set-up" mechanics in the carmen and other crafts was deferred until after the war. (R. 15a) The agreement establishing this seniority was finally entered into between the union and railroad on March 1, 1949. (R. 16a-20a) Under it, those (including Diehl and the non-veterans involved here) completing the 1160 days before March 1, 1949 were all given seniority dates, as carmen, of March 1, 1949; however, among those with this date, their seniority rank relative to each other was the order in which they completed the 1160 days. The "set-up" carmen were not required to accept the promotion to carmen; if they did, they lost seniority as helpers (R. 17a); if they did not, they dropped back to helper positions. (R. 19a) The 1160 days' work required for promotion of "set up" carmen was comparable to the four years' experience usually required for advancement to carmen. (R. 12a)

1, 1946, when he would have completed it but for his absence. (R. 31a). These non-veterans were therefore ahead of Diehl on the carmen's seniority roster, (R. 5a) and enjoyed an advantage over him in those terms and conditions of their employment which are governed by seniority. (R. 33a-34a). Accordingly, Diehl brought this action under the statute to require the employer to place him on the roster ahead of these employees.

As the District Court stated, there is "no substantial issue of fact" in this situation. (R. 35a). Plaintiff moved for summary judgment (R. 29a) but the court granted defendants' motions to dismiss, on the ground that "to restore or compensate or give the equivalent of lost opportunities is something which the law wisely does not attempt". (R. 38a). The court below affirmed, on the ground that, since non-veterans on leave of absence for the time Diehl was in military service would not have achieved the seniority standing he claimed, he was not entitled to it; the court recognized that "if we apply literally the test [of "continuous employment"] supplied by *Oakley* [v. *Louisville & N. R. Co.*, 338 U. S. 278] we must advance Diehl above the four individual appellees," but regarded the statutory clause "shall be considered as having been on furlough or leave of absence" (Section 8(c)) as conflicting with this test; concluding that "we cannot reconcile the irreconcilable," the court rejected *Oakley* and held the leave of absence clause controlling. (R. 58-59).

Summary of Argument

This Court has repeatedly held that the Act entitles the veteran to the position which he would have obtained had he remained "continuously employed" rather than absent in military service. A collective bargaining agreement cannot override this principle by fixing seniority rank in the

order of qualification for promotion, where non-veterans formerly junior to the veteran were able to qualify earlier than he, and so pass him on the seniority roster, only because he was absent in military service. *Oakley* v. *Louisville & N. R. Co.*, 338 U. S. 278, is similar to the present case in all material respects and is controlling here. After the veteran completes the qualification for promotion following his return from military service, he must be given seniority rank ahead of such non-veterans.

That persons on non-military leaves of absence are not so advanced is immaterial to the veteran's right. The statute is not satisfied by merely treating the veteran equally with those on (in the statutory language) "leave of absence," where the "continuous employment" standard would give him more. Such conclusion tears from its context a single clause in the Act and considers it separately and alone to define and limit the entire scope of the Act, contrary to *Oakley* and *Trailmobile Co.* v. *Whirls*, 331 U. S. 40. Both the structure and language of Section 8(c) of the Act show that its several clauses are to be read, not as mutually limiting one another, but as cumulatively conferring on the veteran all the advantages they mention. This is especially true of the "leave of absence" clause, which was added to the Act at the end of its legislative course, as a means of giving the veterans additional protection. Since then, Congress has explicitly approved the "escalator" or "continuous employment" interpretation of the Act adopted by this Court. Thus it is no defense to the veteran's claim to assert, as did the court below, that he was treated equally with those on "leave of absence."

ARGUMENT

I

The "Continuous Employment" Standard (Which This Court Has Said the Statute Establishes) Does Not Permit a Veteran, Whose Absence in Military Service Delayed His Fulfillment of a Qualification Test for Promotion (From Which Seniority Dated in the Higher Job) and Who Met the Test After Returning From Military Service, to be Passed in Seniority Standing by Those Previously Junior to Him Who Because They Remained Continuously Employed Were Able to Meet the Test Earlier Than He Did But After the Date He Would Have Met It Had Military Service Not Interrupted His Employment.

A cardinal principle of the Act is to insure that no veteran should, by reason of having been required to leave his job and serve his country, lose ground in his employment as compared to those who remained behind. That is to say, the veteran is entitled *nunc pro tunc* to what in fact he would have obtained had he not been absent in military service. This principle has been emphasized by this Court in every case which has come here, and is dispositive of this case.

In the present case, the issue is whether a collective bargaining agreement can override this principle by fixing seniority rank in the order of qualification for promotion, where the non-veterans were able to qualify earlier than the veteran, and so pass him on the roster, only because he was absent in military service.

The controlling principle, variously called the "escalator" or "continuous employment" rule, was first laid down in *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275. The veteran was held not entitled to a position on the seniority roster ahead of all non-veterans ("super-seniority") because he would not have achieved such a position

had he remained continuously employed. The reason for this, said the court, was that "The Act was designed to protect the veteran in several ways. He who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job" (328 U. S. at 284). And further, "Thus he does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war." (328 U. S. at 284-5).

And so it has been in each succeeding case. In *Trailmobile Co.* v. *Whirls*, 331 U. S. 40, placing a veteran, along with all other employees of a merged company, in seniority positions below all employees of the merging company did not violate the statute because the veteran's absence in military service in no way contributed to this result,—the veteran was kept "in the same situation as if he had not gone to war but had remained continuously employed." (331 U. S. at 58). In *Aeronautical Lodge* v. *Campbell*, 337 U. S. 521, a collective bargaining agreement placing shop stewards at the top of the seniority roster was held not to be an invalid discrimination against returning veterans who had previously been ahead of the stewards on the roster, because had the veterans remained continuously employed the shop stewards would still have been placed ahead of them; the Act required no more, and no less, than that the veteran be treated as "uninterruptedly a member of the working force." (337 U. S. at 526). And most recently, in *Huffman* v. *Ford Motor Co.*, 345 U. S. 330, it was held that to allow newly-hired employees seniority credit for time spent in military service, and thereby to place a returning veteran in a lower position on the seniority list, does not violate the statutes because the returning veteran's loss of ground, being unconnected with his military service, was not discriminatory or hostile toward returning veterans. Thus the

"escalator" or "continuous employment" principle is not dicta, but the *ratio decidendi* of every one of these cases.

But though these decisions make the principle clear and its application plain enough, the case which is even more obviously controlling here is *Oakley* v. *Louisville & N. R. Co.*, 338 U. S. 278. For the situation of the veterans Oakley and Haynes there was identical to that of Diehl here. Haynes' complaint alleged that while he was in military service, six persons in his job classification junior to him in seniority were promoted to a higher classification, to which he would have been eligible on the basis of seniority had he not been absent. And Oakley, the other veteran, alleged that had he not been in military service when the repair shop at which he worked was closed, he would have been transferred to another shop, with seniority at the new shop as of the date of such transfer. This Court held that both complaints "stated, in effect, that the complainants had not been restored to the place to which they were entitled on the escalators of their respective civilian employments." 338 U. S. at 284.

Like Oakley and Haynes, Diehl alleges that had he not been absent in military service he would have received a different and better position, a higher place on the seniority roster. And it was failure to accord the veterans this which in *Oakley* this Court held amounted to a violation of the Act.

Oakley also specifically repudiated the argument renewed here, that the statute is satisfied if the veteran is simply given his old job, because he then has received his "former position." The argument ignores the fact that the "terms and conditions" of the veteran's former position include whatever right or opportunity exists to advance to another job. Accordingly, it was rejected because (338 U. S. at 283):

> An honorably discharged veteran, covered by the statute, was entitled by the Act to be restored not to

> the position which would be the precise equivalent of that which he had left when he joined the Armed Forces, but rather a position which, on the moving escalator of terms and conditions affecting that particular employment would be comparable to the position which he would have held if he had remained continuously in his civilian employment.

The non-veterans here were able to move ahead of Diehl on the seniority roster only because of Diehl's absence in military service. Diehl has, since returning from military service, met all work or experience requirements and has established his qualification for the higher job in precisely the same way as did the non-veterans. And it is agreed that, had military service not interrupted his employment, he would have done so prior to the time the non-veterans did, and would accordingly have been placed on the seniority roster ahead of them. (R. 6a, 31a).[2] The collective bargaining agreement, however, established seniority rank in the higher job in the order the qualification test was met, i.e. placed Diehl behind the non-veterans. The issue here is simply whether such a provision is valid and controlling as to returning veterans. And it is abundantly clear from every one of this Court's decisions that it is not.

For it is at this point that the Act cuts across the bargaining agreement, to add to it the requirement that the veteran must be placed in the position he would have had, had he remained continuously employed. In giving him less, the agreement here inherently discriminates against the veteran, even though by its terms it applies alike to veterans and non-veterans, and even though no hostility to veterans may have motivated it. Only the "escalator" or "continuous

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[2] This removes from the present case the further defense asserted in *Oakley*, that the veteran lacked the necessary experience on the job and had failed to meet other requirements for promotion. Since that case arose on dismissal of the complaint, the defense was not considered there. See footnote 2 to the opinion, 338 U.S. at 280.

employment" principle can shield the veteran from this loss. In its application here, it requires that Diehl, after qualifying for promotion, be considered to have qualified *nunc pro tunc*, with his seniority accordingly made retroactive to the date he would have qualified but for his absence in military service.[3]

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[3] Such a reading together of the provisions of collective bargaining agreements and those of the Act has been found desirable and workable by many of the major railroads in the country, which have dealt with this situation in exactly the manner which appellants ask the employer to do here. As an example, the New York Central system provides in its bargaining provision covering apprenticeship ("Memorandum of Understanding Relative to Rules of the Shop Crafts Hereinafter Listed," between New York Central and other roads, and System Federation 103 representing crafts here involved):

> An apprentice who, subsequent to May 1, 1940, entered the armed forces of the United States; whose reemployment rights are protected by the Service Extension Act of 1941; who returns to the railroad company's service within the specified period of forty (40) days; and who thereafter resumes and completes his apprenticeship shall, upon completion of apprenticeship, be given the same seniority date as mechanic that he would have obtained if there had been no such interruption in apprenticeship.
>
> *Example.*—Apprentice A began apprenticeship December 1, 1939; was inducted into the U. S. Army December 1, 1941; resumes apprenticeship December 1, 1943; completes apprenticeship December 1, 1945; will be given dating as mechanic December 1, 1942.
>
> *Exception.*—On the Michigan Central no apprentice will be given hereunder a ranking as mechanic ahead of any apprentice who completed his apprenticeship before March 15, 1942, and therefore did not receive the benefit of the one year prior dating provision.
>
> Accepted for System Federation No. 103:
>
> (S.) JOHN RIEBER,
> *Secretary.*
>
> Accepted for Management:
>
> (S.) L. W. HORNING,
> *Manager, Personnel.*
>
> JANUARY 27, 1943.

In the railroad industry similar agreements are in effect on the New Haven, the Great Northern, the Boston & Maine, the Union Pacific, the Santa Fe, the Pennsylvania and the Missouri Pacific, among the major railroads. (These agreements, including the agreement quoted, are on file as a matter of public record with the National Mediation Board, pursuant to the requirements of Section 5, third (e) of the Railway Labor Act, as amended, 48 Stat. 1195, 45 U.S.C. 155.) This gearing of reemploy-

Unions and employers are not free to bargain collectively to give the veterans less than this. Respondents have urged that under *Aeronautical Lodge* v. *Campbell*, 337 U. S. 521, and *Ford Motor Co.* v. *Huffman*, 345 U. S. 330, any provisions of a collective bargaining agreement are binding on the veterans if the agreement was made in good faith rather than in hostility to veterans; and from this respondents conclude that the veteran's seniority here must be established in the order he completed the promotion requirement, even though he would have completed it earlier but for his military absence. But no such conclusion can be drawn from *Campbell* and *Huffman*, for the key to both those decisions is that the veterans would have been in exactly the same positions had they never been in military service. Only where this is the case are the veterans bound by the agreement, as the explicit reliance on the "continuous employment" test in those decisions shows.[4]

Petitioner does not seek to upset the seniority system created by the railroad and the union. He takes that system as it exists, and recognizes its application to him. He contends only that the statute adds to the contractual system the requirement that the rules of that system be applied to the veterans in a manner which will give them the position they would have achieved *under those rules* had military service not interrupted their employment.

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ment rights of veterans to existing collective bargaining systems is also found in the oil industry, the auto industry, and the steel industry. In all of these areas, it has been recognized that seniority is a crucial incident of employment and that preservation of the right is due, in all fairness, to a veteran, not only as a veteran, but as a returning employee within the protection of the collective bargaining system.

[4] Petitioner does not contend that military service must be counted as time on the job, where actual work is required for advancement. Where such a requirement is imposed, the veteran must meet it to the same extent as non-veterans (petitioner has done so), and military service does not afford him any more favored treatment in this respect. This is what is meant by the statement in *Campbell* that the veteran "is not to be favored as a furloughed employee as against his fellows" (337 U.S. at 526), on which respondents so heavily rely.

Once the veteran has established his qualification or eligibility for advancement (here, by completing the work experience requirement after military service), the position he must be given in order to avoid discrimination is simply a factual question, to be determined by proof in the same manner as any other factual question. As the respondent railroad put it in its brief opposing the petition (p. 7, 2d par.), "a veteran must be able to point with reasonable certainty to a step on the escalator" which he would have reached had he remained continuously employed. Since there is agreement here as to the date petitioner would have completed the work requirement but for his military service, he is clearly entitled to seniority ahead of all who completed the requirement at a later date, even though these latter may have completed it earlier than petitioner did.

II

Merely According Veterans Equality With Those "On Furlough or Leave of Absence," With Respect to the Terms and Conditions of Their Employment When They Return, Does Not Satisfy the Statute.

The court below held that "there is a very palpable difference between 'furlough' and 'leave of absence' and 'continuous employment,' " that the two are "irreconcilable" and that the "leave of absence" standard is controlling. It held that since Diehl had been given the same position he would have achieved had he been on leave of absence instead of in military service, the statute was satisfied. Accordingly, it concluded Diehl was not entitled to seniority ahead of the four non-veterans who had jumped over him on the roster because of his absence in military service.

If this view be correct, the statutory protection can be restricted or foreclosed by the union, employer, or both, through appropriate manipulation of the provisions re-

lating to those on non-military leaves of absence—a group neither so numerous, nor absent so long, as the veterans. This prospect is not an imaginary evil, for it was precisely the contention made by Mr. Lyman (counsel for the union here) in behalf of the union in *Oakley* (Union br. in Oakley, p. 18). In fact, over one third of counsel's argument in *Oakley* (i.e. pp. 32-46 of his brief there) was devoted to pressing the "leave of absence" standard on this Court. The union's own argument (brief in opp. to petition, p. 9) that *Oakley* chose the "continuous employment" standard, in preference to either the "leave of absence" standard, or the "on the job" standard urged by the Government,[5] demonstrates clearly the repudiation of the "leave of absence" theory. The rejection was decisive, for the difference is not merely of terminology but of substance, since the "continuous employment" test gave Oakley and Haynes, and will give Diehl here, what they demanded, and the "leave of absence" theory does not.[6]

While *Oakley* thus would seem plainly to dispose of the issue here, the event proved otherwise. This Court's *Oakley* decision was followed by the action of the district

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[5] Whatever phraseology Government attorneys may have used, their position was the same as that of Diehl here. Oakley and Haynes demanded exactly what Diehl claims, and they were held entitled to it. (*Supra*, p. 8)

[6] Some Circuits (see *Addison* v. *Tennessee C. & I. Co.*, 204 F.2d 340 (C.A. 5) and *Raulins* v. *Memphis Union Station*, 168 F.2d 466 (C.A. 6)) have stated an alternative to the "leave of absence" theory, namely, that the Act gives the veteran an advantage beyond what is given those on leave, but only if the veteran has a contractual right to it. This theory is meaningless, since if the contractual right existed, there would be no occasion for invoking the statute. An issue arises only when, as in the present case, the contract (or custom, policy, or whatever else stands in its place) does not give the veteran the advantage. This theory was also urged, and rejected, in *Oakley* (Union brief there, p. 21); and again counsel urged, what was again rebuffed, that the union and employer could control and limit the scope of the statute, in that any protection the veteran had after the first year of reemployment was merely a contractual right, terminable at will in accordance with any modification in the collective bargaining agreement. (Union br. in *Oakley*, pp. 22-23)

court on the remand (19 CCH Labor Cases, par. 66,132) denying Oakley's claim on the "leave of absence" theory. The Sixth Circuit then decided *Gregory* v. *Louisville & N. R. Co.*, 191 F. 2d 856, on this ground; and following the denial of certiorari there (343 U. S. 903) the Fifth Circuit (in *Addison* v. *Tennessee C. & I. Co.*, 204 F. 2d 340) and the Fourth (in *Bostian* v. *Seaboard Airline R. Co.*, 211 F. 2d 867) rejected the "continuous employment" test in favor of the "leave of absence" rule. The Third Circuit in the present case frankly repudiated this Court's views. The Fourth did not consider them worth passing mention. Since these cases were identical in all material respects, a thorough and final refutation of the "leave of absence" theory seems appropriate.

By holding that the statute is satisfied so long as the veteran is treated no worse than those on leave of absence, the court below extracted the "furlough or leave of absence" clause from its context in the statute, and construed it to define and limit the entire protection of the statute. In doing so, it not only rejected the decisions of this Court but also shut its eyes to the structure and language of the statute and its legislative history, which plainly indicate Congress had the same conception of the Act as this Court.

A. ***The structure and language of the Act require that the several clauses of 8(c) be considered as cumulative, and not limits on one another.***

Section 8(c) confers on veterans four rights: (1) to be "considered as having been on furlough or leave of absence;" (2) to be "restored without loss of seniority;" (3) to enjoy "other benefits" in accordance with rules for those "on furlough or leave of absence in effect • • • at the time such person was inducted;" and (4) not to "be discharged without cause within one year after such res-

toration." It will be noted that the phrase "furlough or leave of absence" appears twice.

Grammatically, none of these four clauses modifies another, or relates to the additional rights conferred by 8(b), the rights to be restored to the former position and to enjoy appropriate seniority, status, and pay. Rather, the four clauses of 8(c) are of coordinate importance, and cumulative rather than limiting in character. The language employed confirms the grammar; Section 8(c) is introduced by the phrase "any person who is restored to a position in accordance" with 8(b) "shall be" entitled to the four rights named in 8(c); "shall be" here means "shall *also* be," unless 8(b) and its guaranty of position, seniority, status and pay are mere surplusage. The use of "and" to connect the last right listed in 8(c) with the other three shows clearly that the rights are cumulative, and not mutually limiting, as the court below thought.

As a matter of logic, no other interpretation is possible. So *Trailmobile Co.* v. *Whirls*, 331 U. S. 40, decided in holding that the "discharge without cause within one year" provision could not be construed separately from the other provisions to give the veteran superseniority during his first year of reemployment. For on many occasions, application of the clauses separately leads to conflicting results: if a collective bargaining agreement (or employer practice) provides that those on leave or furlough lose all or part of their seniority after an absence of, say, a month, how can the veteran be restored "without loss of seniority" and at the same time be "considered as having been on furlough or leave?" And if the job of a person on leave may be bid in by another, and persons returning from leave are limited to choosing jobs which are open, what becomes of the guaranty in 8(b) of the veteran's position, seniority, status and pay? And if one kind of leave, say sickness, is treated differently from another kind, say

education, which treatment should be given the veteran? (All these are provisions commonly found in collective bargaining agreements or employer policies.) Similar anomalies occur, of course, if other clauses in the statute are opposed to one another as mutual limitations.

These considerations suggest a fundamental vice in the conclusion below that the statute is satisfied if the veterans are never accorded worse treatment than those on furlough or leave of absence: It permits the statutory protection, which was meant only to insure treatment no worse, to be circumscribed at will by the employer or union through the adoption of appropriately restrictive rules for those on nonmilitary leave, a group whose leaves of absence are likely to be far less important in both number and length than military absences. In fact, of course, the fundamental and principal protection of the statute is found in 8(b), with its guaranty of the veteran's former "position, seniority, status and pay." The veteran is entitled to this as well as to each of the several specific advantages enumerated in 8(c).

That 8(c) complements rather than restricts 8(b) is shown by the separate mentions of the two subsections in 8(c), creating a right of action by the veteran for "failure to comply with the provisions of subsection (b) or subsection (c)." If the clauses of 8(c) are so separable that the application of any one of them exhausts the statute, then its protection would end with the first year of reemployment—precisely contrary to the main holding of this Court in *Oakley*.[7]

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[7] *Aeronautical Lodge* v. *Campbell*, upon which respondents largely rely to show that equality with those on leave of absence is all the Act requires, is no authority for any such conclusion, and was properly given no emphasis by the court below. The Court's observation that the veteran "is not to be favored as a furloughed employee as against his fellows" (337 U.S. at 526) means only that he is not entitled to "superseniority" and cannot substitute military service for a requirement of actual work on the job. See note 4, *supra*, p. 11.

B. *The legislative history shows that the first "furlough or leave of absence" clause does not limit or define the entire statutory protection.*

The history of the bills which became the Selective Service Act in their progressive evolution into the present form of the Act shows quite clearly that the veteran is entitled to *all* of the rights mentioned in the statute, that the clause "shall be considered as having been on furlough or leave of absence" was added to the other rights as an improvement in draftsmanship to afford broader and more definite protection, and that its meaning was understood to be the opposite of the limiting meaning ascribed to it by the court below. Those who molded this statute believed that insertion of the clause would in some cases confer rights that might otherwise be unprotected; they never considered that it was satisfied if the veterans were treated no worse than those on leave or furlough.

As originally introduced in the 76th Congress, neither S. J. Res. 286, which eventually became the National Guard Act, nor S. 4164 and H. R. 10132, which became the Selective Training and Service Act, contained any provision for reemployment of returning veterans. Such provision was first inserted by the Senate Committee on Military Affairs in its consideration of S. 4164, the first of the two measures to be proposed. From the tentative and amorphous statement that it is "the purpose and intent of the Congress that every man who is called from a job when inducted * * * ought to be reemployed in such job or an equally good one without loss of seniority * * * " (Committee Print No. 1, July 23, 1940) the provision evolved through an intermediate stage (Committee Print No. 4, July 27, 1940) into the broader and more definite guarantees that the veteran shall be restored to his "former position or to a position of like status and pay" and "shall be restored without loss of seniority, insurance participation or bene-

fits, or other benefits, and such person shall not be discharged from such position without cause within one year after such restoration" (Committee Print No. 5, July 31, 1940).

This last provision first reached the Senate floor in the National Guard bill, and was passed without change. 86 Cong. Rec. 10068. The House deleted the portion last quoted and inserted "seniority" in the first before "status and pay." H. Rep. No. 2847, 76th Cong., 3d Sess.; 86 Cong. Rec. 10437, 10448. In conference, the second portion was restored and the House addition of "seniority" was retained. H. Rep. No. 2874, 76th Cong., 3d Sess. The Chairman of the House Military Affairs Committee explained the additional references to seniority as intended to provide for restoration of the veteran to his place on the seniority escalator. 86 Cong. Rec. 10761. S. J. Res. 286 was passed by both houses with these changes. 86 Cong. Rec. 10759-10763, 10791; National Guard Act, Joint Resolution of August 27, 1940, c. 689, 54 Stat. 858.

The above reemployment provisions were carried over into the selective service bill. 86 Cong. Rec. 10922-3. It will be noted that, in all these efforts to increase the veterans' protection and make it more certain, the clause "considered as having been on furlough or leave of absence," which the court below interpreted to limit the other rights conferred by the statute, had not yet appeared. This clause was then inserted by an amendment from the Senate floor, which rewrote Section 8(c) in its present form. This amendment the Chairman of the Military Affairs Committee described as follows (86 Cong. Rec. 10914):

> That amendment would make certain that all trainees would receive the same insurance and other benefits as those who are on furlough or leave of absence in private life.

The author of the amendment concurred in this view and stated that the committee professional staff considered it an improvement in language. *(Ibid.)* The National Guard Act was amended to conform with this change. Section 8(d) of the Selective Training and Service Act, 54 Stat. 891.

At this point, Section 8(b) guaranteeing the veteran his former "position," "seniority," "status" and "pay" was already in the bill; so were the other three clauses of 8(c), assuring him he would be restored "without loss of seniority," would enjoy "insurance and other benefits" and would be secure against "discharge without cause." As a further step in the constant effort of Congress to increase the protection of the veteran and make it more secure the "considered as having been on furlough or leave of absence" clause was added. To say that this clause defines or limits the other rights granted, that the statute is satisfied if the veteran is given equality with those on leave of absence, would mean that Congress in one blind stroke destroyed the edifice it had so carefully and thoughtfully erected. It would mean using this clause, conceived as an instrument for adding to the protection of veterans, as a sword to cut them off from nearly all the statutory protection.

But it was not only in creating the statute that Congress showed clearly its protection is not limited to guaranteeing the veteran equality with those on leave of absence. Since then, Congress has inserted the "continuous employment" standard in the statute, and expressly approved the "escalator" principle, in precisely those words of the Court. For in enacting the Selective Service Act of 1948 (62 Stat. 604, 50 U. S. C. App. 459), Congress added Section 9(c)(2), which provides:

> It is hereby declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of

> subsection (b) should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

This paragraph in effect constitutes a legislative declaration of the meaning of the 1940 Act.[8] The Senate Report refers to this provision as a "statement of policy regarding application of the 'escalator principle'" (S. Rept. No. 1268, 80th Cong., 2nd Sess., p. 16). This statement of policy refers to Section 9(b) of the 1948 Act, which section is identical with Section 8(b) of the 1940 Act. Its identity was deliberate on the part of Congress, which was desirous of assuring that "no reemployment right should be granted to personnel serving under this [the 1948] legislation which would contravene, or take precedence over, reemployment rights now enjoyed by men who already have been in the services, and who are now receiving benefits under the 1940 Act." S. Rept. No. 1268, 80th Cong., 2nd Sess., p. 15.[9]

Moreover, in connection with this ratification of the Court's decisions, Congress specifically asserted its under-

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[8] Cf. *United States* v. *Turner Turpentine Co.*, 111 F.2d 400, 404 (C.A. 5); *Great Northern Ry. Co.* v. *United States*, 315 U.S. 262, 277; *First National Bank* v. *Missouri*, 263 U.S. 640; *Tiger* v. *Western Investment Company*, 221 U.S. 286, 309; *Cope* v. *Cope*, 137 U.S. 682, 688; *Stockdale* v. *Insurance Companies*, 20 Wall. 323, 331; *United States* v. *Freeman*, 3 How. 556, 564-565; *N.L.R.B.* v. *John W. Campbell*, 159 F.2d 184 (C.A. 5).

[9] Respondents argued below that the rejection in 1948 of the language in H. R. 6401, 80th Cong., 2d. Sess., that the veteran must have the advantage "to which he would have been entitled *had he been working for the employer* during his period of service in the armed forces" (emphasis added), in favor of the provision quoted in the text, constitutes a rejection of Diehl's claim. This action constituted a rejection of any "on the job" standard, of course, but that is not Diehl's claim. How the action amounts to a rejection of the "continuous employment" standard is somewhat obscure.

standing that the clauses of 8(c) were cumulative in their protection rather than mutually limiting, for it explained the reenacted section 8(c) of the 1940 Act as preserving

> certain benefits, incident to Federal or private employment, to which persons are restored after completion of service such as accumulated seniority rights and insurance benefits. *In addition*, the paragraph prohibits the individual's being discharged or laid off without cause within one year after restoration. (Emphasis added. S. Rep. 1268, 80th Cong., 2d Sess., p. 16.)

Thus, neither this Court nor Congress has found any "irreconcilability" between the continuous employment test and the first "leave of absence" clause. For both have accepted the statute as an "organic whole" and have refused to "tear clauses from their context." See *Trailmobile Co.* v. *Whirls*, 331 U. S. at 55. Since Oakley specifically held that the continuous employment standard applies to "all the terms and conditions" of the employment, there is no warrant for exalting this clause, or other single clause in the Act, to a position of exclusiveness or control over the others, whether in regard to promotion, vacation pay, seniority, or other conditions of employment. As respondent railroad said (brief in opp. to petition, p. 5), "no one statutory phrase can be emphasized to the exclusion of all others." There is no need to "reconcile" the continuous employment principle with the 'leave of absence" or any other clause, for the principle is itself the reconciliation (if any be needed) of all the clauses in the Act.[10]

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[10] Nor is there any need to explain to the Court the importance of the seniority rights which Diehl seeks. Prior decisions have shown the Court's understanding (1) that seniority may govern layoffs, the right to promotion, transfer to a more desirable job, pay rates, choice of shifts, vaca-

Conclusion

For the foregoing reasons, the decision below should be reversed, the "leave of absence" theory explicitly rejected, and the cause remanded for restoration of Diehl to a position on the seniority list ahead of the non-veterans who moved ahead of him because of his absence in military service.

Respectfully submitted,

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tion or pension benefits, or any of the countless incidents which make up the employment status; and (2) that seniority rights are not exhausted upon restoration to work in accordance with the statute, but become effective and operate on any subsequent occasion when seniority may determine the conditions of employment.

APPENDIX

The pertinent provisions of Section 8 of the Selective Training and Service Act of 1940, 54 Stat. 885, 50 U. S. C. App. 308, are as follows:

(a) Any person inducted into the land or naval forces under this act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3(b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. In addition, each such person who is inducted into the land or naval forces under this act for training and service shall be given a physical examination at the beginning of such training and service; and upon the completion of his period of training and service under section 3(b), each such person shall be given another physical examination and, upon the written request of the person concerned, shall be given a statement of medical record by the War Department; Provided, That such statement shall not contain any reference to mental or other conditions which in the judgment of the Secretary of War or the Secretary of Navy would prove injurious to the physical or mental health of the person to whom it pertains.

(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer, and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization con-

tinuing after discharge for a period of not more than one year.

* * * * *

(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

* * * * *

(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

* * * * *

(e) In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to specifically require such employer to comply with

such provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. The court shall order a speedy hearing in such case and shall advance it on the calendar. Upon application to the United States district attorney or comparable official for the district in which such private employer maintains a place of business, by any person claiming to be entitled to the benefits of such provisions, such United States district attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition or other appropriate pleading and the prosecution thereof to specifically require such employer to comply with such provisions: Provided, That no fees or court costs shall be taxed against the person so applying for such benefits.

The Selective Service Act of 1948 (renamed the Universal Military Training and Service Act in 1951) is identical to the above statute except for additions not material here. The subsection enacting the "continuous employment" standard is Section 9(c)(2), 62 Stat. 615, 50 U. S. C. App. 459(c)(2), and is as follows:

(2) It is hereby declared to be the sense of Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

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IN THE

Supreme Court of the United States

October Term, 1954.

No. 246.

PAUL W. DIEHL, JR.,
Petitioner,

v.

LEHIGH VALLEY RAILROAD COMPANY ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR LEHIGH VALLEY RAILROAD COMPANY, ONE OF THE RESPONDENTS.

Lehigh Valley Railroad Company, one of the Respondents, prays that the judgment of the United States Court of Appeals for the Third Circuit be affirmed. The Respondent is satisfied with the Petitioner's statement of the opinions below and the jurisdiction of this Court.

COUNTER-STATEMENT OF QUESTION PRESENTED.

Whether, under the Selective Training and Service Act of 1940, as amended, a veteran restored to the position he left to enter the armed forces, with accumulated seniority for the period of his absence, who subsequently completes the 1160 days of actual work fixed by the applicable collective bargaining agreement as the qualifying requirement for a different and better position, entirely separate and distinct from his former position insofar as seniority and seniority rights are concerned, is entitled to have his seniority ranking in the new position fixed on the basis of the date on which he actually completed the qualifying requirements as prescribed by the applicable agreement, or on the basis of the date on which he might have completed them had he not entered military service.

STATEMENT.

The Petitioner, a veteran, was duly restored on November 11, 1945, by his employer to the position which he had left to enter the armed services (Petitioner's Brief, p. 3). On January 10, 1949, he completed 1160 days of actual work required as qualification for promotion to another job of higher skill (R. 5a). He asks this Court to give him a better ranking in that new job.

The ranking in his employment which the Petitioner asks this Court to change is conferred by a labor agreement duly negotiated between Respondent Lehigh Valley Railroad Company and the Petitioner's collective bargaining agent, System Federation No. 96 of the Railway Employees' Department, American Federation of Labor; there is no question that the ranking results from a correct interpretation of that agreement. If this Court should intervene the agreement will be set aside.

The Petitioner was employed by the Respondent, before he entered the armed forces, as a carman helper, one of four subdivisions of the carmen craft established by the applicable collective bargaining agreement (R. 8a). He was carried on the seniority roster of carmen helpers (R. 10a) with seniority as of the date of his employment; no man could maintain his name on more than one roster (R. 9a).

On February 19, 1943, when he left for service, he had been assigned to perform the duties of a carman. Among the special rules for this craft was the required qualification that an apprenticeship be served or four years *practical experience* at carman work be obtained (R. 9a; emphasis supplied). The comprehensive nature of the required apprenticeship appears from various rules of the collective bargaining agreement (R. 45 et seq.).

When Petitioner was assigned to perform the duties of a carman he had had only eight months' experience. His brief (page 2) concedes that he was not qualified to become a carman. His name was placed on a desk seniority roster without affecting his seniority as a carman helper (R. 11a).

Although the Petitioner's brief (p. 2) seems to assert that the Petitioner, when he left for military service, could have claimed, in due course, promotion to carman, it is plain from the footnote on that page that he had no such right. Petitioner points to no agreement under which he had, or ever would have had a right to promotion at the time of his departure in 1943.

When the Petitioner returned from military service in 1945 his name continued on the roster of carmen helpers with seniority at the date of his original employment (R. 11a). Neither at his departure nor at his return was his name entered on any roster with the name of a qualified carman mechanic (R. 10a). At neither time had he seniority as a carman mechanic or any right to acquire any seniority as a carman mechanic (*Ibid*). He performed the work of

a carman mechanic and was entered upon the "desk seniority roster" only because of emergency and in pursuance of his temporary advancement. No agreement between Lehigh Valley Railroad Company and the Union conferred upon the Petitioner any seniority because his name was listed on the "desk seniority roster."

The status of temporary car inspectors (carmen) was dealt with by a memorandum of agreement dated March 1, 1949 (R. 11a), between Lehigh Valley Railroad Company and the Union. Under that agreement Petitioner and all other persons working temporarily as carmen on March 1, 1949—three and one-half years after Petitioner had been restored to the position with Lehigh Valley Railroad Company which he had left to enter the armed forces—were given the opportunity to elect whether to have their names placed on the roster of carmen, to take seniority on that list as of the date of completing 1160 days actual work—the definition by the parties of the four-year requirement for experience in the applicable labor agreement (R. 12a). Petitioner made this election and, when his name was first entered on the carmen's roster, took seniority as of January 10, 1949, behind the individual intervening defendants who had all completed their practical experience before that date.

The Petitioner's complaint, rejected by the courts below, is not that he did not receive when he returned from service the job which he had left but instead that he was aggrieved by the 1949 agreement negotiated more than three years after his re-employment. He urges in effect *that it be assumed* that had he not been in the armed forces he would *actually have been at work* a sufficient number of days to complete 1160 days of actual work, or practical experience, before the individuals now senior to him.

Argument.

I.

NO PROVISION OF LAW AFFORDS THIS VETERAN THE PERPETUAL PROTECTION WHICH HE SEEKS.

The Petitioner, in 1945, stepped back on the "escalator . . . at the precise point he would have occupied had he kept his position continuously during the war", *Fishgold v. Sullivan Corp.*, 328 U. S. 275, 284 (1946). Whatever advantages in wages, seniority, and the like, accrued to others while he was away accrued to him likewise, immediately upon re-employment, *nunc pro tunc*. He suffered no loss of seniority (R. 11a). There is no dispute about any of these matters.

But it is his position now that in every *subsequent* adjustment, if he succeeds in meeting requirements for a new job, he must again be treated, *nunc pro tunc*, as if he had not been away.*

Having remounted the "escalator" he asks now to be allowed to move about on it as further events take place and new conditions are met, always as if his interval of miiltary service had not existed.

No one could wish to cavil at fair treatment for returning veterans; legislation for their relief should be liberally construed: *Fishgold v. Sullivan Corporation, supra*, at page 285; but plainly, if a veteran is to have any right like that the Petitioner claims its source in the applicable statute must be readily pointed out.

Instead, the Petitioner points only to the provision that he must have a "like position", Sec. 8 (b) (B), denies that

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* Indeed, the Petitioner states this explicitly (Brief for Petitioner, p. 8).

he should be "considered as having been on furlough or leave of absence", Sec. 8 (c), and relies upon this Court's use of the phrase "continuously employed" to sustain his position.

A. The Petitioner Must Bring Himself Within One of the Specific Tests of Sec. 8 (c) if He Is to Escalate.

On the first point, the Petitioner's position in substance is that his claim to a *like* position under Sec. 8 (b) (B) is *greater* than his claim under any of the four definitions of content furnished by Congress in spelling out specific rights under Sec. 8 (c) (Brief for Petitioner, p. 12). This is precisely the reverse of what this Court has said. In *Fishgold v. Sullivan Corp., supra,* at page 284, this Court pointed out that the meaning of Sec. 8 (b) (A), (B) is to protect the veteran "against receiving a job *inferior* to that which he had before entering the armed services." (Emphasis supplied.) This helps the petitioner not at all for it only guarantees him his status on April 15, 1943. To this is *added* by Sec. 8 (c) the guarantee that he shall be "restored without loss of seniority" and shall be considered "as having been on furlough or leave of absence" during the period of his service for his country, with all of the insurance and other benefits accruing to employees on furlough or leave of absence; *ibid.*

As the opinion of this Court there points out it is Sec. 8 (c) which furnishes the escalator; what the Petitioner here is attempting to do when Sec. 8 (c) does not escalate him far enough is then to turn back to Sec. 8 (b) (B) in an attempt to get a further hoist. Such an attempt plainly fails.

B. This Court Has Spoken of "Continuous Employment" Only in Applying the Tests of Sec. 8 (c).

The second prop for the Petitioner's position is the assertion that in construing the Act this Court has created

a doctrine of "continuous employment" and established the proposition that a returned veteran must be treated for all time as if he had been "continuously employed" despite his military service. This is refuted by many expressions of this Court, of which the following is typical, *Aeronautical Lodge v. Campbell*, 337 U. S. 521, 526 (1949):

> "In other words, the Act gives him the status of one who has been 'on furlough or leave of absence' but uninterruptedly a member of the working force on whose behalf successive collective agreements are made. In this way the Act protects the furloughed employee from being prejudiced by any change in the terms of a collective agreement because he is 'on furlough', but he is not to be favored as a furloughed employee as against his fellows. This is the essence of our decision in *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U. S. 275."

Particularly in *Oakley v. Louisville & N. R. Co.*, 338 U. S. 278 (1949), upon which the petitioner relies strongly, is it clear (at page 284) that this Court was vindicating only "the veteran's right to the seniority to which he was entitled by virtue of the Act's treatment of him as though he had remained continuously in his civilian employment . . . He therefore assumes, upon his re-employment, the seniority he would have had if he had remained in his civilian employment."

Every expression of this Court concerning continuity of employment is voiced only in conjunction with a specific test specified in Sec. 8(c): when he is re-employed he must be given the benefit of any improvement through seniority which he missed while away and he must be regarded as having been a member of the working force on furlough; but no expression of this Court breathes independent life into the provisions of Sec. 8(b)(B). The guarantee of that section remains a guarantee of the position which he *left*.

His additional rights, if any, must accrue from Sec. 8(c)—any advantage he would have received if "on furlough or leave of absence"; any right which was a fruit of seniority while he was absent; any other benefit which he would have had on furlough; and not to be discharged "without cause" within one year after his re-employment. These four rights define the escalator and the first three define the bases on which the status of the veteran can be "better" than when he left. They are, of course, cumulative with each other as this Court decided in *Oakley;* but they exhaust the content of any improvement in status which a veteran can claim.

But it is plain in this case that the veteran when restored in 1945 was advanced to precisely the point of seniority where he would have been had he not been away. What he now asks is that at a time three years later, in a new job, he be given through operation of the Act a seniority status higher than that conferred by the very labor agreement which gave him any right at all to the new job. For this there is no warrant.

There is nothing in the facts in *Oakley* which assists the petitioner in his attempt to apply a doctrine guaranteeing him the benefits of "continuous employment". In that case Oakley, while he was in the armed services, missed the opportunity to transfer to another job, and Haynes, whose case was heard at the same time, missed a promotion. These benefits this Court plainly regarded as attributes of *seniority* accruing during absence which the veteran could not lose because of Sec. 8 (c) of the Act.

This Petitioner cannot show, as the District Court found that he cannot (R. 36a), that the status he seeks in a new job was a fruit of the seniority which accrued to his former position after he left, or that when he returned in 1945 he lost any seniority accrued during his absence. When he left he had no right or expectation of promotion to the position of carman; none accrued while he was away. This is the difference between his case and those of Oakley

and Haynes who, when they returned, could claim privileges of transfer or promotion solely by virtue of seniority in being part of a working force. So, too, does it differ from cases in the various Courts of Appeals where veterans have been held entitled to missed opportunities accruing in their absence because *seniority* guaranteed by Sec. 8 (c) brought those privileges within their grasp. In *Morris v. Chesapeake & Ohio Railroad Co.*, 171 F. 2d 579 (C. A. 7th 1948) a veteran missed an examination which his seniority would have entitled him to take; he was held to be protected by Sec. 8 (c). In *Conner v. Pennsylvania Railroad Co.*, 177 F. 2d 854 (App. D. C. 1949) and in *Spearmon v. Thompson*, 167 F. 2d 626 (C. A. 8th 1948) relief was properly granted in cases where the opportunity missed by veterans was found to be a perquisite of seniority accruing during their absence.

But that is not the case of the petitioner here. The seniority *in a new position* which he asks is plainly different from the seniority in his old position of which the Act assured him. He can have it only if it be assumed that had his absence in the armed services not occurred he would have completed the necessary qualifying time to assure him the senior rank in that new position. No such assumption is justified by the Act. In protecting veterans Congress has not required the Courts to guess.

The Court below, since it could not sustain the plaintiff's case on seniority, properly held that it would then sustain the labor agreement defining his seniority in a new position since that agreement treated the plaintiff fairly with all other members of his class and no worse than had he been on "leave of absence". See *Aeronautical Lodge v. Campbell, supra.* In so deciding the matter and in refusing to speculate when the petitioner might have completed his 1160 days of actual work the Court below followed the reasoning of many decisions of other courts of

appeal, in the Fifth Circuit: *Lipscomb v. Tennessee Coal Iron & R. R. Co.*, 189 F. 2d 708 (1951); *Special Service Co. v. Delaney*, 172 F. 2d 16 (1949); in the Sixth Circuit: *Gregory v. Louisville & N. R. R.*, 191 F. 2d 856 (1951); *Brown v. Watt Car & Wheel Co.*, 182 F. 2d 570 (1950); *Trischler v. Universal Potteries, Inc.*, 171 F. 2d 707 (1948); *Raulins v. Memphis Union Station Co.*, 168 F. 2d 466 (1948); in the Seventh Circuit: *Fries v. Pennsylvania Railroad*, 195 F. 2d 445 (1952); *Hewitt v. System Federation No. 152*, 161 F. 2d 545 (1947); and in the Ninth Circuit: *Seattle Star, Inc. v. Randolph*, 168 F. 2d 274 (1948).

The Petitioner is not correct in suggesting that the Court below equates the Petitioner's position with that of persons on leave of absence; the Court offers him that protection only because it can find no other guarantee on which the Petitioner can rely.

C. The Provisions of the 1948 Act Only Restate This Court's Interpretation.

The Selective Service Act of 1948 (62 Stat. 604, 50 U. S. C. App. 459) restates the terms of the 1940 Act and adds a declaration that a returned veteran shall be "so restored" as to give him status as he would have enjoyed if he had continued "in such employment continuously." This was already the doctrine of this Court in defining seniority rights to be given a veteran upon his return and rights which he might have had if on leave of absence. Since the statutory language is unchanged, no change of interpretation by this Court seems required.

CONCLUSION.

The Petitioner, after military service, was restored to his position without loss of seniority. What he asks here is that this Court improve his status in a new job for which he qualified long after his return and to which he was promoted under the terms of a *bona fide* labor agreement which also defines his seniority status. He points to no seniority right accruing while he was away which has been denied him; he has been treated no worse than if on furlough or leave of absence. The requirements of the Selective Training and Service Act have been satisfied and the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX.

The pertinent provisions of Section 8 of the Selective Training and Service Act of 1940, 54 Stat. 885, 50 U. S. C. App. 308, are as follows:

(a) Any person inducted into the land or naval forces under this act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3(b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. In addition, each such person who is inducted into the land or naval forces under this act for training and service shall be given a physical examination at the beginning of such training and service; and upon the completion of his period of training and service under section 3(b), each such person shall be given another physical examination and, upon the written request of the person concerned, shall be given a statement of medical record by the War Department; Provided, That such statement shall not contain any reference to mental or other conditions which in the judgment of the Secretary of War or the Secretary of Navy would prove injurious to the physical or mental health of the person to whom it pertains.

(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer, and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing

after discharge for a period of not more than one year—

• • •

(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

• • •

(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

• • •

(e) In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to specifically require such employer to comply with such provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefits

suffered by reason of such employer's unlawful action. The court shall order a speedy hearing in such case and shall advance it on the calendar. Upon application to the United States district attorney or comparable official for the district in which such private employer maintains a place of business, by any person claiming to be entitled to the benefits of such provisions, such United States district attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition or other appropriate pleading and the prosecution thereof to specifically require such employer to comply with such provisions: Provided, That no fees or court costs shall be taxed against the person so applying for such benefits.

The Selective Service Act of 1948 (renamed the Universal Military Training and Service Act in 1951) is identical to the above statute except for additions not material here. The subsection enacting the "continuous employment" standard is Section 9(c)(2), 62 Stat. 615, 50 U.S.C. App. 459(c)(2), and is as follows:

(2) It is hereby declared to be the sense of Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

October Term, 1954

No. 246

PAUL W. DIEHL, JR.,

Petitioner,

vs.

LEHIGH VALLEY RAILROAD COMPANY, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF INTERVENING DEFENDANTS—RESPONDENTS

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IN THE

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No. 246

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vs.

LEHIGH VALLEY RAILROAD COMPANY, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF INTERVENING DEFENDANTS—RESPONDENTS

STATUTES INVOLVED

The material provisions of the Selective Training and Service Act of 1940, as amended (54 Stat. 885, 50 U.S.C. App. Sec. 301 et seq.), and of the Selective Service Act of 1948 (62 Stat. 604, 50 U.S.C. App. Sec. 451 et seq.), including portions omitted by petitioner but vital to the questions of interpretation presented here, are set forth in an Appendix hereto.

COUNTER-STATEMENT OF QUESTION PRESENTED

Whether a veteran restored to the same position he left to enter the armed forces, with all of the contractual rights and incidents of that position including accumulated seniority for the period of his absence, and who subsequently completes a period of working experience which for the

first time, by virtue of a collective bargaining agreement negotiated more than three (3) years subsequent to his reemployment, qualified him for promotion to a different and better position, entirely separate and distinct from his former position insofar as seniority and seniority rights are concerned, is entitled by virtue of the requirements of the Selective Training and Service Act of 1940, as amended, to have his seniority ranking in the new position fixed not on the basis of his actual completion of the required working experience, as prescribed by the agreement under which he became eligible for promotion, but on the basis of the date on which he could have completed it had he not entered military service.

STATEMENT OF THE CASE

As noted in the opinion of the District Court (R. 35a), although both sides filed affidavits in connection with their motions, "no substantial issue of fact is raised by them and they are in the main merely explanatory". However, although the factual statements in petitioner's brief are in general correct, some elaboration is required for a complete and accurate factual picture.

While it is true that petitioner was at all times material hereto a member of the craft or class of respondent Railroad Company's employees known as "carmen", it should be emphasized that the craft is composed of several completely separate and distinct categories or classifications, among which are those of carmen mechanics (also sometimes referred to as "journeymen"), apprentices, and helpers. By virtue of agreements between the Railroad Company and the collective bargaining representative, respondent System Federation No. 96, employees in each of these categories possessed certain rights, entitling them to certain preferences in their employment, such as in or-

der of layoffs and recall to work, dependent upon their length of service, or amount of seniority, in the particular classification. But an employee can hold seniority in only one of such classifications at any time, dating from the time he was first regularly or permanently assigned to a position in such classification at his point of employment. (R. 9a, 10a.)

Normally, under Rules 32 (R. 43) and 120 (R. 22a) of the basic or "schedule" agreement between the System Federation and the Railroad Company, the only persons qualified to perform mechanic's work were those who had served an apprenticeship, or who had accumulated 4 years' practical experience at mechanic's work and could prove their mechanical ability. However, to relieve a wartime shortage of qualified journeymen, it became necessary to use helpers and other unqualified classes of employees to fill in on mechanic's work; and the System Federation and the Railroad Company, on August 29, 1944, entered into a memorandum agreement which provided, among other things, that helpers who were temporarily "set up", or "upgraded" to perform mechanic's work would receive the mechanic's rate of pay for the work to which they were assigned, but would retain their helper's seniority rights and would not acquire any permanent status, or seniority as mechanics. (R. 10a, 13a-15a.)

Petitioner was given an upgraded assignment on February 19, 1943, and had performed mechanic's work on this temporary basis for approximately two months when he entered the armed forces on April 15, 1943. Upon his return he was reemployed by the Railroad Company on November 12, 1945, was restored to his former position as helper, was given the same helper's seniority "date" he had when he left (thus accumulating helper's seniority during his absence in the armed forces), and was again placed in an upgraded status and temporarily assigned to

the performance of mechanic's work at the mechanic's rate of pay. (R. 11a.)

It was not until March 1, 1949, that any helper upgraded under the wartime memorandum agreements was permitted to acquire permanent status and seniority as a carman mechanic. On that date, by a memorandum of agreement negotiated between the Railroad Company and the System Federation (R. 16a-20a), it was agreed that carman helpers who were still working on upgraded assignments, as temporary mechanics, and who had worked on such assignments for at least 1160 days, would be permitted to elect to take permanent mechanic's status and seniority and to forfeit their seniority as helpers. Persons making this election were all to receive a mechanic's seniority date of March 1, 1949, the effective date of the agreement, but the criterion adopted for determining their seniority ranking on the roster as among themselves[1] was the order in which they had acquired the necessary 1160 days' experience at the upgraded work. (As noted in one of the affidavits filed below (R. 12a), this criterion of 1160 days' experience is comparable to the journeymen's qualification requirement, in the basic agreement, of 4 years' practical experience at mechanic's work.) As written, interpreted and applied, this agreement required 1160 days of *actual working experience.* This qualification requirement was *not* satisfied by the *mere passage of time* following the employee's upgrading. Non-veteran employees whose service was interrupted by illness or leave of absence could not apply the time they were absent against the 1160-day requirement. (R. 12a-13a.)

Petitioner and a number of other upgraded helpers made this election and were placed on the mechanics' roster with seniority dates of March 1, 1949 (R. 33a); certain of these others (the individual intervening defendants-respon-

[1]The matter in dispute here.

dents herein) had completed their 1160 days' experience earlier than did petitioner, and hence were listed ahead of him on the mechanics' roster (R. 33a-34a).

The complaint alleged that if petitioner had remained in the Railroad Company's employ instead of entering the armed forces, he would have completed his 1160 days' experience at the upgraded work earlier than he in fact completed it; and that if such had been the case, he would now enjoy a position on the mechanics' seniority roster ahead of the four individual intervening defendants-respondents. It was claimed that the Selective Training and Service Act of 1940 (54 Stat. 885; 50 U.S.C. App. Sec. 301 et seq.), as amended, required that he be accorded that superior position.

Motions to dismiss were filed in the District Court both by the Railroad Company (R. 7a) and the intervening defendants (R. 27a).[2] An affidavit in support of the Railroad Company's motion (R. 8a) was received as permitted by Rule 12 (b) of the Federal Rules of Civil Procedure. Petitioner filed a counter affidavit (R. 24a), and a motion for summary judgment with supporting affidavit (R. 29a), and the Railroad Company filed a counter affidavit (R. 9a).

The District Court granted the motions to dismiss after noting that there was no substantial disagreement as to the facts of the case. In its opinion (R. 35a) the trial court pointed out that the plaintiff had been restored to the same position he had left without loss of seniority and with

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[2]Among the grounds urged in support of the intervening defendants' motion were (1) lack of jurisdiction of the subject matter, if the complaint were construed as asserting rights under the applicable collective bargaining agreements rather than the Selective Training and Service Act, and (2) that the action was barred by limitations and laches. In the proceedings below petitioner disavowed any intent to rely on the agreements rather than the Act. The questions of limitations and laches were not decided by either court below, but these objections are fully sustained on the record herein, and constitute separate grounds for affirmance. "A reviewing court may look into the record; and if the judgment below appears to be right for any reason, it is the duty of the reviewing court to affirm it." (3 Am. Jur., "Appeal and Error", p. 674.) "A respondent or an appellee may urge any matter appearing in the record in support of a judgment . . ." LeTulle v. Schofield, 308 U.S. 415.

seniority credit for the time he had been in military service, "in exact compliance with the provision of the Act that he be considered as having been on furlough or leave of absence." (R. 37a-38a.) The District Court was of the view that the subsequent union agreements were not invalid because they in no way operated to impair the seniority status to which the plaintiff was entitled when he returned from the armed forces. (R. 36a-37a.) The opinion further pointed out that the law does not attempt to restore or compensate or give to the veteran the equivalent of lost opportunities (R. 38a), nor require that military service be taken as the equivalent of experience in the craft (R. 39a).

The Court of Appeals below affirmed, saying:

> "... The decision of the court below fitted Diehl precisely into the seniority system created by the March 1, 1949 Agreement. He is dealt with on a parity with other employees who are non-veterans. To put him above the four individual appellees would seem to award him a kind of superseniority not contemplated by any statute." (R. 59-60; 211 F. (2d), p. 100.)

SUMMARY OF ARGUMENT

The reemployment provisions of the Selective Training and Service Act of 1940 entitled the returning veteran to restoration to his former position, with accumulated seniority for the period of his absence and full enjoyment of the rights and incidents of the position to which he was thus restored, to the same extent as if he had been on furlough or leave of absence from it during his military service. Neither the language of the statute, its legislative history, nor decisions of the courts interpreting it support the theory of any mandatory requirement that in addition the veteran must be given, *nunc pro tunc*, a retroactive status

and seniority in a different and better position for which he is able to qualify subsequently to his reemployment, and for which he could have qualified earlier only by undergoing a prescribed course of training or by accumulating a specified amount of actual working experience.

Petitioner's contentions are in direct conflict with the clear wording of the statute. Congress has refused to amend the Act so as to incorporate the guarantees sought by petitioner, but has contented itself with a statement of policy indicating that while such advantages to veterans are favored, they are not mandatory. The courts have overwhelmingly rejected petitioner's arguments with respect to the interpretation of the Act.

The question here presented has not previously been decided by this Court, none of the cases before it having turned upon a differentiation between the status which the veteran would have enjoyed had he been on furlough or leave of absence, and that for which he could have qualified only through working experience or training gained from actual presence on the job.

In addition to the basic question involved, affirmance of the decision below is warranted by virtue of petitioner's laches in asserting his claim, and also because the unusual facts of this case bring it squarely within the doctrine of *Trailmobile Co. v. Whirls*, 331 U.S. 40.

ARGUMENT

I. THE SELECTIVE TRAINING AND SERVICE ACT DID NOT ENTITLE A REEMPLOYED VETERAN SUBSEQUENTLY QUALIFYING FOR A DIFFERENT AND BETTER POSITION THAN THAT WHICH HE LEFT AND TO WHICH HE WAS RESTORED, TO HAVE THE PERIOD OF HIS MILITARY SERVICE CONSIDERED AS EQUIVALENT TO ACTUAL WORKING EXPERIENCE SO AS TO ESTABLISH, *NUNC PRO TUNC*, FOR PURPOSES OF DETERMINING HIS STATUS AND SENIORITY RANKING IN THE NEW POSITION, A HYPOTHETICAL QUALIFYING DATE EARLIER THAN THE DATE OF ACTUAL COMPLETION OF THE QUALIFYING REQUIREMENTS.

In this action petitioner is asserting purely statutory rights, and in order to prevail must bring himself within the scope of the statute relied upon. His eligibility as a veteran for whatever reemployment rights the Selective Training and Service Act gave him is not in issue here, but the question is simply one of statutory interpretation with respect to the scope of the rights created by the Act.

When he entered the armed forces, petitioner held a position as helper, with seniority rights in that classification only. Under the applicable agreements, his upgrading or temporary assignment to carman mechanic's work carried with it no right to establish seniority or permanent status in the latter classification. Here, as in most railroad employment, completely separate and distinct seniority units prevailed for the various crafts of employees and subdivisions within the crafts, such as those of helper and carman mechanic involved here.[3]

[3]As Mr. Justice Frankfurter observed in the Court's opinion in *Aeronautical Industrial Dist. Lodge 727 v. Campbell*, 337 U.S. 521, 526-527: ". . . There are great variations in the use of the seniority principle through collective bargaining bearing on the time when seniority begins, determination of the units subject to the same seniority, and the consequences which flow from seniority. All these variations disclose limitations upon the dogmatic use of the principle of seniority

(Footnote continued on next page)

Upon his return from the armed forces petitioner was restored to his helper's position and again placed on the same upgraded or temporary assignment to carman mechanic's work. It is not contended that he failed to receive his full helper's seniority rights, including accumulated seniority for the period of his absence in the armed forces. For more than 3 years following his reemployment petitioner's status remained unchanged, until on March 1, 1949, solely by virtue of the collective bargaining agreement negotiated at that time, he and other "upgraded" helpers first became eligible to apply for permanent status as carmen mechanics. That eligibility was not an attribute of their seniority as helpers, but rather of the working experience acquired on the temporary assignments to carman mechanic's work. There is no contention that petitioner was ever denied any of the rights and attributes of his restored position of helper, or the fruits of accumulated seniority.

The challenge rather is to the validity of petitioner's seniority ranking, in the mechanics' seniority unit, on the basis of the date on which he actually completed the working experience requirement, as provided in the March 1, 1949, agreement, rather than the date on which he could have completed it if he had not entered military service. While none of the upgraded helpers were given mechanic's seniority antedating March 1, 1949, petitioner and others who had previously accumulated the requisite 1160 days' experience, while all being given mechanic's seniority as of that date, were ranked among each other in the order of their completion of the 1160 days.

Petitioner takes the broad position that the Selective Training and Service Act did not merely entitle him to be

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in the interest of the ultimate aims of collective bargaining. Thus, probationary conditions must often be met before seniority begins to operate; sometimes it becomes retroactive to the date of employment; in other instances it is effective only as from the qualifying date; in some industries it is determined on a company basis, in others the occupation or the plant is taken as the unit for seniority determination . . ."

restored to his former position, without loss of seniority, and to be considered as having been on furlough or leave of absence from that position, but that in addition, at each future step in his employment career, as he qualifies himself for different or better positions, he must be given "*nunc pro tunc*", a retroactive, hypothetical status in the new seniority unit. In effect, graphically if ungrammatically, the contention is that the Act not only guaranteed the reemployed veteran against having to start his career all over again, by permitting him to "take up where he left off", but that it further provided for his advancement to new and different positions to the same extent as if he had been working on the job during the entire period of his absence.

The argument thus advanced by counsel for petitioner is not novel, and its rejection by the District Court and the Court of Appeals below was preceded by a series of decisions by numerous other federal courts, over a period of a number of years, refusing with substantial unanimity to adopt the strained interpretation of the statute now urged upon this Court. Unsuccessful attempts to obtain a review of several of those decisions were based upon precisely the same theory as that now advanced on behalf of petitioner.[4] While this Court has not previously passed upon the question presented here, its previous decisions dealing with veterans' reemployment rights not only fail to support petitioner's contentions but we believe point the way for their rejection. No language can be found in the statute to support the theory urged, but instead the clear wording of the Act completely fails to encompass the type of advantage sought by petitioner. And perhaps most conclusive, and precisely contrary to what counsel for petitioner would

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[4]*Dougherty v. General Motors Corp.*, 176 F. (2d) 561 (C.A. 3), cert. den. 338 U.S. 956; *Foster v. General Motors Corp.*, 191 F. (2d) 907 (C.A. 7), cert. den. 343 U.S. 906, rehearing den. 343 U.S. 937; *Gregory v. Louisville & N.R. Co.*, 191 F. (2d) 856 (C.A. 6), cert. den. 343 U.S. 903; *Brown v. Watt Car & Wheel Co.*, 182 F. (2d) 570 (C.A. 6), cert. den. 340 U. S. 875.

have the Court believe, is the fact that Congress itself has plainly refused to accord to returning veterans any legally enforceable rights of the type here sought.

In line with the foregoing observations, we shall accordingly direct our attention in turn to the language of the statute involved, its legislative history bearing upon the question at issue, and the authorities dealing with the question.

A. The Language of the Statute Fails to Support Petitioner's Claim.

Although petitioner predicates his claim upon the Selective Training and Service Act, there is no language in the Act which supports his contention.

The Act requires that in the case of a veteran who left a position, other than a temporary position, in the employ of a private employer, "such employer shall restore such person *to such position* or to a position of like seniority, status and pay." (Sec. 8 (b) (B); emphasis supplied.)

But petitioner seems to claim that when Congress said the veteran must be restored to his former position that is not what it meant; that it intended rather that the veteran must be restored *not* to his former position, but to whatever different position or status he might have been able to achieve, either before or after his return and reemployment, if he had remained on the job and accumulated working experience instead of entering the armed forces. We do not agree that the quoted portion of the Act is subject to an interpretation which is so much at variance with the actual language used by Congress. On the contrary, subsequent portions of the Act contain language which, in our opinion, directly precludes any such interpretation.

Having set up the requirement that returning veterans

must be restored *to their former position,* Congress then went on to define precisely the status and rights of persons *so restored.* In so doing it provided in Section 8 (c) of the Act, that:

> "Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) *shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces* * * *" (Emphasis supplied.)

Petitioner has presented an intricate and extensive grammatical argument, at pages 12-16 of his brief, the gist of which, insofar as we can follow it, appears to be that the foregoing portion of Section 8 (c) of the Act was not intended to limit or define, or presumably have any relation whatsoever to, the other provisions of Section 8 (b) and (c). It is argued that none of the several clauses of 8 (c) "modifies another, or relates to the additional rights conferred by 8 (b)" (br., p. 12).[5] But the discussion fails to show by what process of transmutation the requirement of Section 8 (b) that veterans be restored to their former positions is converted into a statutory command to place them in new and completely different positions. Nor is it explained why all of the provisions of Section 8 (c), which petitioner says create rights unrelated to those of 8 (b), are by their express wording made referrable to the preceding section (e.g., "shall be *so restored* without loss of seniority", and "shall not be discharged from *such position*").

The fact is, of course, that while Section 8 (c) was added to the Act, by an amendment made during committee hearings before the statute was adopted, in order to aug-

[5]Insofar as it is comprehensible, petitioner's grammatical argument appears substantially the same as that urged by the Government, and rejected by this Court, in *Trailmobile Co. v. Whirls,* 331 U.S. 40, at pp. 53-56. There the Court concluded that "The restoration provisions define the very character of the place . . . to which the veteran must be restored." (p. 55.)

ment the benefits conferred by Sections 8 (b) (B), Congress just did not go quite so far as petitioner contends in supplementing the bare requirement of restoration to the veteran's former position. As Judge Learned Hand observed in *Fishgold v. Sullivan Drydock & Repair Corp.*, 154 F. (2d) 785, affirmed by this Court at 328 U.S. 275:

> "... As subsection B reads, it would probably be understood to restore the veteran only to that same position which he held when he was inducted * * * To remedy this, by an amendment made while the bill was in Congress, *he was given the same status that he would have had, if he had been 'on furlough or leave of absence' while he was in the service. How far that differed from his position, had he remained actively at work, does not appear; but clearly the amendment presupposed that a difference there might be* * * *"
> (154 F. (2d) 785, 788; emphasis supplied.)

Petitioner would have the Court conclude, as a result of this elaborate grammatical argument and discussion of the legislative history of the 1940 Act, that the final language adopted by Congress, with respect to considering the returned veteran as having been on furlough or leave of absence, was in no way indicative of the veteran's restored employment status; but the only explanation offered as to the meaning of the phrase is that it was intended as "an improvement in draftsmanship" and "to afford broader and more definite protection".

Nowhere, however, does petitioner point to language in the Act supporting his contention that Congress was not attempting to restore the veteran's former seniority position, but instead sought to give him seniority rights and status not previously held, in a position completely new and different from that which he left to enter the armed forces, for which he was not qualified upon his return, and for which he could not have become qualified if he had been

on furlough or leave of absence during the period of his military service.

B. Congressional Rejection of Petitioner's Contentions

Although petitioner asserts that his interpretation of the statute has been endorsed by Congress, quite the contrary is true. The fact is, of course, that there is nothing in the legislative history of the 1940 Act to justify petitioner's interpretation of it, and subsequent legislative developments in fact clearly demonstrate the unwillingness of Congress to go to the extreme urged by petitioner.

Thus, when the Selective Service Act of 1948 (50 U.S.C. App. Sec. 451, et seq.) was under consideration, the following language embodied in H.R. 6401, 80th Congress, 2nd Session, was proposed to be included in order to entitle returning veterans to be restored not just to their "former positions", as in the 1940 Act, but to other and different positions to which they might have been promoted had they not been absent:

> "Sec. 8 (d) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) or of subsection (c) shall be considered as having been on furlough or leave of absence during his period of service in the armed forces, *shall be entitled to all promotions*, increases in pay, vacation rights not otherwise regulated by law, and accumulations of seniority to *which he would have been entitled had he been working for the employer during his period of service in the armed forces* * * *" (Emphasis supplied.)

Congress did not include the above quoted language in the Act as finally adopted, but instead adopted the following provisions:

"(2) *It is hereby declared to be the sense of the Congress* that any person who is restored to a position in accordance with the provisions of paragraph (a) or (B) of subsection (b) *should* be restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment." (Emphasis supplied; Selective Service Act of 1948, Section 9 (c) 2).

That the language last quoted above was intended to be *precatory* and not mandatory is clearly indicated by a reading of the following provisions of Section 9 (b) of the 1948 Act imposing mandatory obligations to reemploy veterans upon (A) the United States Government, its territories, or possessions, or political subdivisions thereof, or the District of Columbia, and (B) upon private employers, but providing only for a "precatory" or suggested treatment of veterans who left the employment of (C) any state or political subdivision thereof:

"(A) if such position was in the employ of the United States Government, its Territories, or possessions, or political subdivisions thereof, or the District of Columbia, *such person shall* • • • be restored to such position • • •

"(B) if such position was in the employ of a private employer, *such person shall* • • • be restored • • • to such position

"(C) if such position was in the employ of any State or political subdivision thereof, it is hereby *declared to be the sense of the Congress that such person should* • • • be restored to such position • • •"[6] (Emphasis supplied.)

Furthermore, it should be noted that in Section 9 (d)

[6]The quoted "sense of the Congress" language is identical with that appearing in Section 8 (b) (C) of the 1940 Act.

of the 1948 Act, providing for court action to enforce the obligations of the statute, no provision is made for enforcement of Section 9 (c) (2), paragraph (d) reading in part as follows:

> "(d) In case any private employer fails or refuses to comply with the provisions of subsection (b) *or subsection (c) (1)*, the district court", etc. (Emphasis supplied.)

We submit that the rejection by Congress of a proposal for the express guaranty of promotions for veterans, and the substitution therefor of language which on its face does not require such treatment but merely suggests its desirability as a matter of policy, clearly demonstrates that Congress did not wish to create any such rights as petitioner asserts in a legal, or mandatory, sense, but was content with the statement of a policy the application of which it desired but did not require.

It is of course apparent from the above discussion that we do not agree with the Court of Appeals below that the provisions of Section 9 (c) (1) of the 1948 Act are in conflict with the above-quoted terms of Section 9 (c) (2), but instead feel that they are in fact definitely "reconcilable"; and as so reconciled it is clear that they not only support but require the ruling arrived at by the court below.

In view of this legislative background, and the clear rejection by Congress of the theory urged here by petitioner, it becomes apparent that litigation such as this simply constitutes an attempt to obtain from the courts, under the guise of statutory interpretation, benefits which Congress has expressly refused to confer.

C. The Interpretation of the Statute Urged by Petitioner Has Been Rejected by the Great Weight of Judicial Authority and Is Unsupported by Previous Decisions of This Court.

In spite of the fact that no previous decision of this Court turned upon a consideration of the issue here presented, petitioner's argument is based almost entirely on the bold assertion that the theory which he here urges has been the *ratio decidendi* of every important case in which the Court has dealt with the subject of veterans' reemployment rights. (Br., p. 6.) No decisions of any other courts have been cited to support the interpretation of the statute for which petitioner contends, and the overwhelming weight of contrary decisions by eminent federal judges, literally throughout the length and breadth of the land, is cavalierly disposed of as recalcitrance and repudiation of this Court's views. (Br., p. 11.)

We do not share petitioner's apparent appraisal of the present state of the authorities as constituting a revolt of the federal judiciary against this Court's authority, or indeed his view that the Court has decided the question here in any case previously before it. We shall therefore direct attention to a number of decisions of the lower federal courts dealing directly with this problem, with the thought that while not of course binding upon this Court, they reflect the opinions of many eminent judges which are entitled to consideration, and which may be helpful to the Court in arriving at its decision here. And with these cases as a background, we shall conclude this portion of our brief by pointing out the erroneous nature of the conclusions which petitioner seeks to draw from the five decisions of this Court upon which he relies.

The most recent Court of Appeals decision, handed down subsequently to that of the court below, is the ruling in *Bostian v. Seaboard Air Line R. Co.*, 211 F. (2d) 867

(C.A. 4, April 5, 1954), which rejected the contention that veterans restored to positions as apprentices, and subsequently completing their terms of apprenticeship and receiving positions as journeymen mechanics, were entitled by the statute to a *nunc pro tunc* antedating of their mechanics' seniority to correspond to the dates on which they could have completed their apprenticeships had they not entered military service. The court said:

> "We think it clear that the statute was complied with. It is well settled that what the employee is entitled to under the statute is to be restored to the position which he left with the seniority that he would have had if he had remained working in that position, not to be promoted to another position that he might have obtained if he had not left or to be awarded seniority in such position . . . ." (Citing, p. 868, the decision of the Court of Appeals below in this case, as well as numerous other decisions embodying the same holding.)

Petitioner urges (Br., p. 11) that in deciding the *Bostian* case the Fourth Circuit did not consider this Court's views "worth a passing mention". This presupposes that the Fourth Circuit agreed with the position of counsel for petitioner as to what this Court's views were; but the fact is that it obviously did not.[7] Precisely the same theory of statutory interpretation urged by petitioner here was advanced in the Government's brief in the *Bostian* case, and was the subject of the entire oral argument before the Court of Appeals, which directed extensive and searching questions to counsel in connection therewith. It is simply inaccurate for petitioner to imply that his arguments urged here were not fully presented to and considered by the Fourth Circuit.

The same representations as to this Court's views

[7]The veterans in the *Bostian* case were represented before the Court of Appeals by Mr. Leet, counsel for petitioner here, when he was Chief Counsel of the Veterans' Reemployment Rights Division of the Department of Labor.

were made to the Court of Appeals for the Fifth Circuit in another recent case, *Addison v. Tennessee Coal, Iron & R.R.*, 204 F. (2d) 340 (decided May 15, 1953), in which the veteran was also represented by Government attorneys, including representatives of the Department of Justice in Washington. It is apparent from the court's opinion that Government Counsel representing the plaintiff advanced the same arguments as here with respect to the "escalator principle", the effect of the *Fishgold* and *Oakley* decisions, and the legislative history in connection with the 1948 statute. These arguments are all specifically considered and rejected in the court's opinion, and (contrary to the impression which petitioner seeks to convey in footnote 7, p. 11, of his brief here) the "furlough or leave of absence" test adopted in affirming the District Court's dismissal of the action.

In the *Addison* case, the plaintiff veteran had completed a portion of his apprenticeship training at the time of entering the armed forces, and upon his return and reemployment he completed the balance of his training and was assigned to a position as journeyman machinist, with seniority as such beginning on the date of such assignment. He contended that he should instead be given journeyman's seniority dating from the time he would have completed his apprenticeship training had he not been absent in military service. In rejecting this contention, the court said:

> ". . . It was the established practice that all time lost by an apprentice due to illness, vacation, leave of absence, lay-off, work stoppage or any other cause had to be made up before the apprentice could complete the training program."
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> * * * * *
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> "The trial court rejected Addison's contention that he is entitled to have his seniority as journeyman machinist dated retroactive to September 7, 1944, un-

der Sections 8 (b) and (c) of the Act, *supra*. It held that while a veteran is entitled to be restored without loss of seniority to the position which he left when he entered upon military service, he is not entitled to seniority in a position which he might have obtained had he not left the employment. In applying this rule to the facts of this case, giving consideration to the fact that the apprenticeship training program could not be completed unless the prescribed number of training hours were actually achieved by the trainee, and that both under the terms of the program and the established practice of the employer all time lost by the apprentice due to illness, vacation, leave of absence, or any other cause, had to be made up before he was entitled to be termed a tradesman in his line, the court concluded that Addison was entitled to seniority in the position of journeyman machinist on the date he actually completed the training program and was assigned to that position, and not prior thereto.

"The contention of Government counsel, appearing on behalf of appellant,[2] that this holding is erroneous is supported by an impressive argument and brief. In general effect, the argument is that Section 8 of the statute, *supra*, guarantees the plaintiff-appellant the right to seniority as a machinist computed from the date upon which he would have been so classified if he had remained continuously in his civilian employment and excuses such veteran's failure to satisfy conditions of promotions during his absence, and that the court should reconstruct the course of employment which he would have followed if he had remained in civilian employment and ascertain when he would have been so classified and enforce the veteran's rights accordingly.

"The former decisions of this Court invalidate the appellant's contentions and settle the question sought to be presented. They establish that where an employee has no fixed or absolute right to promo-

"[2]As provided in Section 8 (e) of the Selective Training and Service Act of 1940, 54 Stat. 885, 50 U.S.C. (App.), Section 308 (e)." (Footnote as in court's opinion.)

tion, and where his right to promotion depends upon qualifications over and above mere length of service, the returning veteran is entitled only to be restored to the same position, or one of like seniority in status and pay, which he held at the time of his induction into the service, plus accumulated seniority,[3] that while entitled 'to the same job . . . he is not entitled to promotions received by his successor during his absence;'[4] that the Act requires the returning serviceman to be 'considered as having been on furlough or leave of absence', and thus, where promotion or pay is dependent upon qualifications other than mere length of service, the time of service in the armed forces cannot be treated as the equivalent of such qualifications.[5] Other courts of appeals have similarly construed and applied the pertinent provisions of the Act.[6]

"We do not consider that the controlling effect of our decisions referred to is affected by the decision in *Oakley v. L. & N. R.R. Co.*, 338 U.S. 278, upon which counsel for appellant heavily rely, as 'a significant amplification of the escalator principle first set out in *Fishgold v. Sullivan Corp.*, 328 U.S. 275.' Our decisions have consistently cited and applied the principles of the *Fishgold* case. The question here involved was not presented for decision in the *Oakley* case, *supra*. The question there related to a veteran's employment seniority status subsequent to the one year employment period provided by the statute. Neither do we find, as confidently urged by the appellant, that the language of Section 9 (e) (2) of the Selective Service Act of 1948[7] is effective as a legislative construction

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"[3]*Harvey v. Braniff International Airways*, 164 F. (2d) 521; *Oil Workers International Union v. Sinclair Refining Co.*, 171 F. (2d) 192.

"[4]*Special Service Co. v. Delaney*, 172 F. (2d) 16, 19.

"[5]*Altgens v. The Associated Press*, 188 F. (2d) 727; *Lipscomb v. Tenn. Coal, Iron & R. Co.*, 189 F. (2d) 708. See also *Doyle v. Division No.* 1127, 76 F. Supp. 655, affirmed 168 F. (2d) 876.

"[6]*Raulins v. Memphis Union Station Co.*, 6 Cir., 168 F. (2d) 470; *Hewitt v. System Federation No.* 152, 7 Cir., 161 F. (2d) 545; *Spearmon v. Thompson*, 8 Cir., 167 F. (2d) 626; *Nevins v. Curtiss-Wright Corp.*, 6 Cir. 172 F. (2d) 535; *Gregory v. Louisville & N. R.R.*, 92 F. Supp. 770, affirmed 191 F. (2d) 856."

"[7]62 Stat. 604 50 U. S. C. (App.) Section 459.

(Footnotes as in court's opinion.)

of the former Act and requires, in this case, the application of different principles than those above referred to."[8]

[8]*Nevins v. Curtiss-Wright Corp., supra.*" (Footnote as in court's opinion.)

In the case of *Altgens v. The Associated Press*, 188 F. (2d) 727, cited in the footnote to the above quotation from the *Addison* opinion, the Fifth Circuit had rejected a contention by the veteran plaintiffs that time spent in the armed forces must be treated as time in the active service of the employer, so as to give them the rate of pay to which the step-rate system prescribed by applicable union agreement would have entitled them had they not been absent. In that case, the court said:

"Time spent in the service of our armed forces, however, praiseworthy it may be, is not necessarily wire-photo experience in any sense of the word, and we can find no language in the statute which authorizes us to call it such.

"The Act by its terms requires the returning service man to be 'considered as having been on furlough or leave of absence' during his military service, and clearly does not require him to be put in a position, when he returns, that he could not have attained had he not had a certain amount of experience * * *"

The same court, in the case of *Special Service Co. v. Delaney*, 172 F. (2d) 16, also noted in the *Addison* opinion, rejected a veteran's claim to a promotion that he said he would have received if he had not been in the armed forces, saying:

"The plaintiff sought to buttress his claim for the apprentice job by showing that his successor as a laborer was upgraded to an apprentice when the company ceased to use laborers in New Orleans. This does not establish a claim to the position of apprentice, for, although the returning service man is en-

titled to the same job he had on leaving for military service, he is not entitled to promotions received by his successor during his absence. * * *

"From the facts proved, Rosario Delaney was, while employed by Special Service Co., engaged as a laborer and was forbidden by the union contract and by company policy to engage in mechanics' work, and, further, the position of apprentice then, as at the present time, constituted a higher classification of employment. The law is clear that under the statute, 50 U.S. C.A. Appendix, Sec. 308, the employee is entitled to his old job or an equivalent job but is not entitled to advance to a higher classification, in the absence of some particular agreement of employment during his service with the Armed Forces."

In the case of *Seattle Star, Inc. v. Randolph*, 168 F. (2d) 274, decided by the Court of Appeals for the Ninth Circuit, the plaintiff veterans claimed that when their employer dispensed with their services, along with those of a number of other employees, upon termination of its business, their severance pay (to which all employees were entitled under the union agreement) had to be computed as if they had remained in the active service of their employer during the period of their military service. In rejecting this contention, the court said:

"Therefore, since 308 (c) provides that time spent in the armed forces should be considered as time spent on furlough or leave of absence, such time cannot be counted as continuous service time for the employer because of its exclusion therefrom by clause 6 of Article VIII of the contract in effect at the time they entered the service.

"It is argued that unless the contract be so interpreted as to permit appellees' time in the armed services to be considered as full time employment, said contract conflicts with 8 (c) of the Selective Service and Training Act and is against public policy. Such a con-

> tention is diametrically opposed to the plain reading of 8 (c) and gives no effect to the requirement that the determination shall be made on the basis of the rules applicable at the time of induction to those on furlough or leave of absence. * * *"

The recent decision of the Court of Appeals for the Seventh Circuit in the case of *Fries v. Pennsylvania R. Co.*, 195 F. (2d) 445, similarly rejected a contention that the veteran's military service must be credited as experience on the job. There the court said:

> "It is true, of course, that a failure to pass or refusal to take the examinations provided by the agreement in effect at the time plaintiff entered the military service could only result in his demotion to a 'junior brakeman,' while, under the agreement entered into while plaintiff was in the service, a failure to pass or the declination on the part of any employee who had 'actually worked' less than 528 days to take the examinations called for a cessation of his employment. The latter agreement, however, was uniformly effective as to all employees irrespective of whether they were actually at work, in the military service or on furlough or leave of absence because of ill health or for some other reason. Plaintiff contends that the time which he spent in the service should be counted as days 'actually worked,' at least to the extent of crediting him with having actually worked 528 days. We find no support in the cases or in the Act for such a theory."

Another case clearly supporting our position as to the Act's interpretation is that of *Trischler v. Universal Potteries, Inc.*, 171 F. (2d) 707, where an apprentice claimed the right to the journeyman's status that he would have achieved if he had not been in military service, and other plaintiffs claimed the right to displace employees who had been promoted to apprentice positions which plaintiffs would have been entitled to by virtue of their seniority had

they not been absent in the armed forces. In affirming a judgment denying these claims, the court said:

> ". . . that each of the appellants has failed to prove that appellee, Universal Potteries, Inc., has not considered him as having been on furlough or leave of absence during his period of training in service in the land or naval force;
>
> ". . . that each of the appellants has failed to prove that he has not been restored without loss of seniority or that he is not participating in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time he was inducted into the armed forces . . ."[8]

To the same effect is the case of *Gregory v. Louisville & N. R. Co.*, 191 F. (2d) 856 (C.A. 6), cert. den. 343 U.S. 903, adopting the conclusions of the District Court (92 F. Supp. 770) denying the claims of laborers to helper's seniority as of the date they said they would have been promoted to helper positions had they not been absent in military service. And in the case of *Raulins v. Memphis Union Station Co.*, 168 F. (2d) 466 (C.A. 6), the same court said:

> ". . . If the appellants had been on furlough or leave of absence, instead of in the service, when the vacancies occurred, they would not have obtained the promotions which they are now claiming. Section 8 of the Act provides that the employee shall be considered as having been on furlough or leave of absence during his period of training. Rule 13 of the Collective Bargaining Agreement, dealing with leave of absence, provided for such a leave for a period not exceeding 30 days with privileges of renewal, but made

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[8]Detailed facts in the *Trischler* case are stated in the District Court's opinion at 78 F. Supp. 609.

> no provision that an employee who has been absent upon leave may upon returning exercise those rights that would have been available to him if he had not been absent." (p. 469.)

The same sort of argument as petitioner urges here was also rejected by the Court of Appeals for the Seventh Circuit in the case of *Lesher v. P. R. Mallory & Co.*, 166 F. (2d) 983, where we find the following statement:

> "Plaintiffs argue that they 'were giving satisfactory service and surely would have attained seniority if the draft had not prevented it.' That, of course, is in the realm of speculation and does not aid plaintiffs' cause. The purpose of the Act, as we have shown, was to preserve for veterans upon their return the employment status they occupied at the time they left it for military service, and not to create a status which they never had, even though it might have been attained had they not been called."

Of all the various circumstances which might give rise to the question of interpretation of the Selective Training and Service Act here involved, those involving claims to vacation rights have probably created the most litigation. Such claims have become fairly well stereotyped, and are to the following effect: The amount of vacation pay, or length of paid vacation, being predicated in most contracts on length of service, the returning veteran claims that he must be given the same vacation rights that the contract would entitle him to had he remained on the job, instead of entering the armed forces, even though non-veteran employees are not credited with time on furlough or leave of absence in the computation of their vacation rights, but the Courts of Appeals for all of the Circuits in which these cases have arisen are in complete unanimity in rejecting the claims.

In *Brown v. Watt Car & Wheel Co.*, 182 F. (2d) 570,

(C.A. 6), cert. den. 340 U.S. 875, the court rejected contentions similar to those of petitioner and said:

> "It seems clear that the appellee has fully complied with the provisions of Sec. 8 (b) (B). It required the appellee to restore the appellant to his former position. The stipulated facts are that the appellee restored the appellant to his former position. The stipulated facts are that the appellee restored the appellant to his former position with the pay and seniority of said position. What rights the appellant has upon being so restored to his former position are controlled by the provisions of Sec. 8 (c) which specifically provides 'Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered * * *.' Accordingly, the question presented by the present case is the construction to be given to the provisions of Sec. 8 (c).
>
> "Nor do we agree with the further contention that under Sec. 8 (c) the time spent in the service is to be treated as time in the continuous employ of the appellee in applying Article IX, Section B of the Union contract. Sec. 8 (c) provides that the reemployed veteran shall be considered as having been on furlough or leave of absence during his period of service, and shall be entitled to participate in insurance, 'or other benefits' offered by the employer pursuant to the practices relating to employees on furlough or leave of absence in effect at the time such person was inducted. * * * non-veteran employees on furlough or leave of absence were not permitted by the rules of the employer to count such time in qualifying for vacation benefits. The reemployed veteran is by the terms of the statute in the same classification. He has not been discriminated against. He has been treated the same as the non-veteran employee. He is not entitled to more under the Act."

Decisions in other Circuits to the same effect as the *Brown* case are as follows: *Dwyer v. Crosby Co.*, 167 F.

(2d) 567, and *Siaskiewicz v. General Electric Co.*, 166 F. (2d) 463 (C.A. 2); *Dougherty v. General Motors Corp.*, 176 F. (2d) 561 (C.A. 3), cert. den. 338 U.S. 956; and *Foster v. General Motors Corp.*, 191 F. (2d) 907 (C.A. 7), cert. den. 343 U.S. 906, rehearing den. 343 U.S. 937.

Even more numerous are the unappealed District Court decisions dealing with this question and denying claims based on petitioner's theory of the scope of the statute. The most recent of these is that of Judge Delehant, of the Nebraska District Court, in the case of *Lee v. Union Pacific Railroad*, decided September 18, 1954, and unofficially reported at 34 L.R.R.M. 2776, and 26 C.C.H. Labor Cases, No. 68,698. In disposing of the same argument as is adjudged here, Judge Delehant said:

> "The statute itself is the source of the special protection and privileges afforded to a returning veteran. It gives him what its words provide, no more and no less. It has, of course, to be fairly construed to ascertain and accomplish its manifest purpose. But interpretation must not be perverted to the purposes of legislation. Liberal construction should not afford an excuse for misconstruction.
>
> "By the quoted subsection (b) (B) (1), subject to the prescribed conditions, he is entitled, if his employer was a private person or agency, as distinguished from the United States or a State or a subdivision of either, 'to be restored to the position' he left for his military service 'or to a position of like seniority, status, and pay'. And by way of explanation, it is further provided that he 'shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employes on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces.'

"Thus, an honorably discharged veteran is entitled to restoration to the position he vacated or one of like seniority, status and pay and to be regarded as having been on furlough or leave of absence during his military service. Generally, and within the thought of the Spearmon case, he is entitled to those betterments in his status which would certainly have come to him, but for his military service, solely by the passage of time. But the statute does not provide that he shall be considered as having been on active duty in his employer's service during his period of military training and service. It need not be argued that a furlough or leave of absence is radically different from continued work on one's job. Nor does the act in anywise guarantee to a returned veteran promotions or job reclassifications which he might—and even probably would—have received if he had remained out of the military service. And, the statute being silent in the matter, the courts have no power to supply a supposed gap or confer on veterans advantages which the congress did not see fit to provide. Considerations of generosity in that behalf are appropriate for legislative motivation. They have no proper place in judicial study."

Examples of other District Court opinions arriving at the same conclusion are the following:

Zaversnik v. Union Pac. R. Co., 95 F. Supp. 209;

Huffman v. Norfolk & Western Ry. Co., 71 F. Supp. 564;

Woods v. Glen Alden Coal Co., 73 F. Supp. 871;

Monticue v. Baltimore and O. R. Co., 91 F. Supp. 561;

Flynn v. Ward Leonard Electric Co., 84 F. Supp. 399; and

Cushnier v. Ford Motor Co., 89 F. Supp. 491.

It would perhaps be well at this point to mention that

while they are not relied upon in petitioner's present brief, three Court of Appeals decisions allegedly supporting petitioner's position were cited in connection with the petition for a writ of certiorari herein. These cases, *Morris v. C. & O. Ry.*, 171 F. (2d) 579 (C.A. 7), *Conner v. Penna. R.R.*, 177 F. (2d) 854 (C.A. D.C.), and *Spearmon v. Thompson*, 167 F. (2d) 626 (C.A. 8), cross-petitions for cert. den. 335 U.S. 822 (*Thompson v. Spearmon*) and 335 U.S. 886, (*Delozier v. Thompson*), were discussed in detail at pages 12-15 of the Brief of Intervening Defendants-Respondents in Opposition, previously filed herein, and because they are not now cited by petitioner we will not repeat that discussion here. However, in connection with the *Morris* case, we wish at this point to emphatically deny the charge of "lack of candor" attributed to us at p. 2 of the reply brief in support of the petition herein, filed on behalf of petitioner by Mr. Bernstein, whose firm appears of counsel on petitioner's present brief. In this connection, we respectfully refer the Court to the brief discussion of the *Morris* case and excerpts from the record therein which is attached as part of the Appendix hereto.

Previous Decisions of this Court

The question presented here has never been decided by this Court. Yet petitioner relies almost entirely upon five decisions of the Court which he says have for their *ratio decidendi* the precise theory here advanced. This is even more remarkable in view of the fact that in four of the five cases the Court rejected the claims of the plaintiff veterans, and in the fifth expressly limited the decision to the effect of the statute's prohibition against discharge for one year as a limitation upon the period during which the statutory guarantees might be enforced.

The four cases in question, *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, *Trailmobile Co. v.*

Whirls, 331 U.S. 40, *Aeronautical Industrial Dist. Lodge 727 v. Campbell*, 337 U.S. 521, and *Ford Motor Co. v. Huffman*, 345 U.S. 330, all simply *denied* the returning veteran a *superior* status to that which he would have occupied had he not entered the armed forces. None of those cases involved claims to promotions or different positions from those which the veterans left to enter the armed forces. In each instance there was only one seniority unit or "escalator" involved. No question of job qualifications was present. And in each case the result reached was that which would follow from considering the veteran as having been on furlough or leave of absence during his military service. It was, in fact, completely immaterial to the result in those cases whether the veteran be treated as having been on furlough or leave of absence, or actually working on the job.

Those cases are, however, very pertinent here with respect to the meaning of the language used in the Court's fifth opinion, *Oakley v. Louisville & N. R. Co.*, 338 U.S. 278, upon which petitioner so heavily relies. The *Oakley* case was not, of course, decided on the merits. It did not hold, as petitioner urges (Br., p. 7) that a violation of the Act had occurred. The allegations of the complaint with respect to the positions and seniority to which the statute entitled the veterans to be restored were accepted as true, and the Court ruled only on the question, raised by the lower court's dismissal of the cases as moot, of whether the alleged statutory rights expired upon the termination of one year of reemployment by the veteran's pre-service employer. (See Note 2 to the Court's opinion.)

Petitioner's reliance on the *Oakley* case is based on the Court's description of the veteran's restored position as that which he would have held "if he had remained continuously in his civilian employment". He urges in effect that the Court, though having refrained from passing

on the merits of the case, was by implication trying to indicate how the merits should be decided. But we do not believe that the Court would so decide an issue of the sort here involved, which as we have pointed out had not previously been before it, in an opinion in which the issue is not even discussed and which fails to mention any of the cases in which the issue had been decided by other courts.

Contrary to petitioner's assertions, it seems to us that in view of the theories advanced by the parties to the *Oakley* case, in brief and oral argument, and the language in which they were stated, the calculated use of some such phrase as the reference to "continuous employment" was just about the only way the Court could avoid giving support to the position of *either* party on the merits of the case. Thus, while purporting to argue the plaintiffs' contentions with respect to the effect of the Act's one-year guarantee against discharge without cause, the Government attorneys had repeatedly used the phrase "on the job" in describing the employment status which the statute required the veteran to be considered as having occupied during his absence in military service. (See pages 9, 12, 15, 19, and 33 of the Government's brief in the *Oakley* case.) Counsel for the respondents, on the other hand (with the thought that silence on their part might be construed as acquiescence in the theory of interpretation of the statute which the Government presumably wished the Court to accept and adopt as if there had never been any question about it) had just as repeatedly urged that the veteran must be considered, in the words of the statute itself, as having been "on furlough or leave of absence". *Neither* of these phrases appears in the *Oakley* opinion, and instead we find the use of the phrase "continuous employment". We think it is apparent from the previous opinions of the Court that by this description of the veteran's status in terms of "continuous employment", the Court was able to avoid deciding whether the "on the job"

test or the "furlough or leave of absence" test properly reflected the meaning of the statute, and thus accomplish its stated purpose of limiting the *Oakley* decision to the one-year limitation question.[9]

Thus in the *Fishgold* case it was held that an employee on furlough or leave of absence has a continuing employment relationship, and that restoration of the veteran to a furlough status constituted restoration to his position of employment within the meaning of the Act. And in the *Campbell* case the Court said that the Act gives the veteran "the status of one who has been 'on furlough or leave of absence' but uninterruptedly a member of the working force". (337 U.S., at p. 526.)

II. ADDITIONAL GROUNDS FOR AFFIRMANCE OF THE DECISION BELOW.

In the preceding portions of this brief we have discussed the principal question involved and have stated the basic objections to the merits of petitioner's contentions. However, the circumstances and chronology of this case, involving such a lengthy delay between petitioner's reemployment on November 12, 1945, and the commencement of this action on November 28, 1951 (R. 1a), suggested the additional defenses of limitations and laches which, as pointed out in our footnote 2 above, may still be urged in support of the judgment appealed from even though not ruled upon by the court below. Inasmuch as we have established that the decision below should be affirmed on the basic question presented, we shall here comment only briefly on the additional grounds for affirmance.

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[9]We have never argued, as asserted by petitioner (Br. p. 11), that the *Oakley* decision establishes a "continuous employment" standard *in preference* to either the "leave of absence" standard or the "on the job" standard, but rather that the Court refrained from making any choice between the two when the point at issue did not require a choice to be made.

Essentially, the statute sued upon requires the returning veteran's employer to reemploy him and not to discharge him without cause for a year thereafter. Yet here, petitioner's only complaint is with respect to matters which occurred more than three years after his reemployment, and this action was not filed until more than six years had elapsed from the date of such reemployment.

The Selective Training and Service Act of 1940, as amended, prescribes no period of limitation for the bringing of an action to enforce the reemployment rights guaranteed. Under these circumstances, although a federal right is being asserted, it is well established that the applicable state statute of limitations controls. See *Walsh v. Chicago Bridge & Iron Co.*, 90 F. Supp. 322, a veteran's reemployment case, where the court cited *Campbell v. City of Haverhill*, 155 U.S. 610, as illustrative of the general rule.

Thus if plaintiff's action under the reemployment provisions of the Act be deemed to have accrued at the time of his return and reemployment,[10] it would be barred by the Pennsylvania "catch-all" statute of limitations (there being no express limitations statute for actions brought under the Selective Training and Service Act) which specifies a six-year period for the bringing of actions not otherwise provided for. (Purden's Pennsylvania Statutes Annotated, Title 12, Sec. 31.)

The application of the equitable doctrine of laches to the situation here presents an even stronger case for holding the action to be barred. In cases brought under the Selective Training and Service Act, the courts have pointed out that Congress particularly desired promptness on

[10]It is of course doubtful that the claim here asserted would be construed as accruing prior to the action taken March 1, 1949, fixing the seniority ranking complained of. But, as we point out, if it did not accrue until the latter date, it is difficult to see how it could be brought under the reemployment provisions of the Act at all.

the part of all concerned in effecting the restoration of returning veterans to their places in private industry.

Some of the cases holding that delay in filing actions under this statute constituted such laches as to bar the plaintiff veteran from maintaining his action are *Daniels v. Barfield*, 77 F. Supp. 283 (a delay of 7 months); *Marque v. Stern*, 88 F. Supp. 306 (a delay of approximately 2 years); *Lacek v. Peoples Laundry Co.*, 94 F. Supp. 399 (slightly less than 4 years' delay; and *Polansky v. Elastic Stop Nut Corporation*, 78 F. Supp. 74 (13 months' delay).

Whatever the reasons for petitioner's delay in filing this suit, it is clear that the individual intervening defendants herein, who would be the only parties adversely affected by the granting of petitioner's seniority claim, have necessarily been prejudiced by the delay, in that they have been led to feel secure in the possession of a seniority ranking in connection with their employment, of which petitioner seeks to deprive them.

Finally, it seems to us that in view of the chronology of the material facts here, and the absence of any questions as to the propriety of petitioner's reemployed status during the period from the date of his reemployment, November 12, 1945, to March 1, 1949, his attack upon the agreement executed on the latter date is clearly foreclosed by this Court's holding in *Trailmobile Co. v. Whirls*, 331 U.S. 40.

CONCLUSION

For a period of approximately ten years the seniority rankings of employees on the railroads throughout the country and in general industry have been established on the basis of an interpretation of the statute which petitioner is now asking this Court to overturn. We have shown that the interpretation that has been followed is in accord-

ance with the clear language of the statute and the Congressional intent revealed by its legislative history, and has been approved with substantial unanimity in numerous decisions of the courts. The theory urged by petitioner is opposed to the plain meaning of the statute and has been specifically rejected by the courts and Congress. Petitioner has been accorded his full reemployment rights and benefits under the statute and has not been discriminated against.

For these reasons we submit that the decision reached by the courts below was correct and should be affirmed.

Respectfully submitted,

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Dated at Toledo, Ohio, this
21st day of January, 1955.

APPENDIX

STATUTES INVOLVED

The material provisions of the Selective Training and Service Act of 1940, as amended (54 Stat. 885, 50 U.S.C. App. Sec. 301 et seq.), are as follows:

"SECTION 8. (a) Any person inducted into the land or naval forces under this act for training and service, who, in the judgment of those in authority over him satisfactorily completes his period of training and service under section 3 (b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. In addition, each such person who is inducted into the land or naval forces under this act for training and service shall be given a physical examination at the beginning of such training and service; and upon the completion of his period of training and service under section 3 (b), each such person shall be given another physical examination and, upon the written request of the person concerned, shall be given a statement of medical record by the War Department; *Provided*, That such statement shall not contain any reference to mental or other conditions which in the judgment of the Secretary of War or the Secretary of Navy would prove injurious to the physical or mental health of the person to whom it pertains.

"(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer, and who (1) received such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

"(A) if such position was in the employ of the United States Government, its Territories or possessions, or the District of Columbia, such person shall be restored to such position or to a position of like seniority, status, and pay;

"(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

"(C) if such position was in the employ of any State or political subdivision thereof, it is hereby declared to be the sense of the Congress that such person should be restored to such position or to a position of like seniority, status, and pay.

"(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the times such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

* * * * * * * * * * *

"(e) In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such

provisions, to specifically require such employer to comply with such provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. The court shall order a speedy hearing in any such case and shall advance it on the calendar. Upon application to the United States district attorney or comparable official for the district in which such private employer maintains a place of business, by any person claiming to be entitled to the benefits of such provisions, such United States district attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof to specifically require such employer to comply with such provisions: *Provided*, That no fees or court costs shall be taxed against the person so applying for such benefits."

The Selective Service Act of 1948 (62 Stat. 604, 50 U.S.C. App. Sec. 451 et seq.), contains, in Section 9 thereof, provisions substantially identical to the above portion of Section 8 of the 1940 Act. However, Section 8 (c) of the 1940 Act becomes Section 9 (c) (1) of the 1948 Act. Section 9 (c) (2), an entirely new paragraph, and the relevant portion of 9 (d), formerly 8 (e), are as follows:

"(2) It is hereby declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

"(d) In case any private employer fails or refuses to comply with the provisions of subsection (b)

or subsection (c) (1), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, specifically to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. . . ."

Discussion and record references to case of Morris v. C. & O. Ry., 171 F. (2d) 579 (C.A. 7), cert den. 336 U.S. 967 (October term, 1948, No. 638).

Petitioner's reply brief in support of the petition herein charges (p. 2) that in our brief in opposition to certiorari we erred "in asserting that in *Morris* there was an 'arrangement or practice whereby employees on furlough or leave of absence had positions tentatively assigned to them in absentia.'" It further charges us with a "lack of candor" and with having been "repeatedly and specifically advised of the factual inaccuracy of this statement". While not wishing to complicate the body of the argument in this brief with a discussion of this charge, we did not feel that it should be left unanswered.

First of all, it should be noted that petitioner misquoted the statement said to be factually inaccurate. What we said was:

> "And in the *Morris* case there was *evidence of* an arrangement or practice whereby employees on furlough or leave of absence had positions tentatively assigned to them *in absentia* pending the establishment of their qualifications."

The accuracy of this statement may readily be verified by reference to the *Morris* case transcript of record as

filed in this Court on the petition for writ of certiorari (No. 638, October Term, 1948, *The Chesapeake and Ohio Railway Company v. Gilmer S. Morris*). In fact, as a short and complete answer to petitioner's assertions, *Morris himself* was permitted to bid on a vacancy while still in military service and stationed at Santa Ana, California. (R. 15-16, and Finding 9, R. 168.) Moreover, the union chairman in the *Morris* case testified that although there was some dispute with the company about it, he had mailed bulletins of vacancies to men who were not on the territory and were on furlough or leave of absence. (R. 28-29.) The same chairman testified as follows at R. 31:

"Q. Isn't it true if a man is on sick leave, he is extended the opportunity to bid on a bulletined position?

"A. That is right."

. . . .

"Q. Is his bid accepted, pending the time that he is able to come in and take the examination to further qualify himself?

. . . .

"A. Well, the way I understand the question, the man, after he is given the bid for dispatcher, he can go ahead and accept the position, if he is qualified."

And at R. 33:

"Q. Do you ever have anybody bidding in when he is on sick leave?

"A. We have had men bid that were off of the territory. I have had a case that they refused a man who was off the territory, they refused to give him a bid. Then under those circumstances they accepted the bid.

"Q. They have accepted the bid when he was not there?

"A. Yes."

Finally, the following statement from the Court of Appeals opinion in the *Morris* case, made to distinguish it from *Raulins v. Memphis Union Station Co.*, 168 F. (2d) 466 (C.A. 6), seems to us entirely consistent with the above quoted testimony:

> "In our case the factual situation is materially different. Both the terms of the union agreement and the custom decreed that the dispatchers be taken after qualification according to their seniority from the telegraphers' roster." (171 F. (2d), at 580.)

CERTIFICATE OF SERVICE

I, Richard R. Lyman, one of the attorneys for the intervening Defendants-Respondents herein, and a member of the bar of the Supreme Court of the United States, hereby certify that I have served the foregoing document upon all parties of record herein on the 21st day of January, 1955, by mailing copies thereof, in properly addressed envelopes, with air mail postage prepaid, to the following counsel of record:

Sheldon E. Bernstein, Newmyer & Bress, 1001 - 15th Street, N.W., Washington, D. C., Attorneys for Petitioner, and Harry E. Sprogell, Saul, Ewing, Remick & Saul, 2301 Packard Building, Philadelphia, Pennsylvania, Attorney for Respondent Lehigh Valley Railroad Company.

.....

Richard R. Lyman
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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 246

PAUL W. DIEHL, JR., PETITIONER

v.

LEHIGH VALLEY RAILROAD COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This case presents the question whether a veteran who, after his return to private employment from military service and upon his completion of the qualifying requirements fixed by the applicable collective bargaining agreement, is promoted to a higher job, possesses a statutory entitlement to seniority in that job from the date upon which he would have completed the requirements and would have been promoted had he not entered the military

service. The position of the petitioner veteran is that, under the provisions of Section 8 of the Selective Training and Service Act of 1940, 54 Stat. 885, 890, as amended, 50 U. S. C. App. (1946 ed.) 308, the answer to the question is in the affirmative. The court below, however, has held that, by computing petitioner's seniority from the date upon which, because of his absence in the military service, he actually completed the qualifying requirements, the respondent employer has complied with the mandate of the Act. 211 F. 2d 95.

In both courts below, petitioner was represented at his request by the Government.[1] Following the determination of the Court of Appeals, he was advised that, after further study, the Solicitor General deemed it inappropriate to file a petition for a writ of certiorari. On July 29, 1954, a petition for certiorari was filed on his behalf by private counsel. On October 25, 1954, the petition was granted. 348 U. S. 860.

The Solicitor General's decision not to seek review by this Court was motivated neither by the belief that the question presented lacked sufficient importance to warrant such review nor by doubt in respect to the merit of petitioner's position. The Department of Justice has consistently regarded petitioner's view as to the scope of the protection afforded the returning veteran by Section 8 of the

[1] Section 8(c) of the Selective Training and Service Act (50 U.S.C. App. (1946 ed.) 308c) authorizes the United States Attorney to represent the veteran in judicial proceedings to obtain employer compliance with the provisions of the Act.

Selective Training and Service Act, as that Section has been interpreted by this Court,[2] to be wholly correct and has urged it upon the lower courts—albeit unsuccessfully—in several other cases on behalf of veterans in like circumstances. See *e. g. Gregory* v. *Louisville & N. R. Co.*, 191 F. 2d 856 (C. A. 6), certiorari denied, 343 U. S. 903; *Addison* v. *Tennessee Coal, Iron & Railroad Co.*, 204 F. 2d 340 (C.A. 5); *Bostian* v. *Seaboard Airline R. Co.*, 211 F. 2d 867 (C.A. 4). It was solely because of the denial of the petition for certiorari filed by the Government in *Gregory*, and the absence of a subsequent conflict between the circuits,[3] that we believed there to be no hope of a successful petition in the instant case. Now that certiorari has been granted, it is appropriate for the Government to present, briefly and summarily, its views in support of the petitioner.[4]

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[2] *Oakley* v. *Louisville & N. R. Co.*, 338 U.S. 278. See also *Fishgold* v. *Sullivan Dry Dock and Repair Corp.*, 328 U.S. 275; *Trailmobile Co.* v. *Whirls*, 331 U.S. 40. See n. 5, *infra*, p. 5.

[3] Several pre-*Gregory* Court of Appeals decisions, however, appear in conflict with the determination below. See *e.g.*, *Morris* v. *Chesapeake & O. Ry Co.*, 171 F. 2d 579 (C.A. 7), certiorari denied, 336 U.S. 967; *Spearmon* v. *Thompson*, 167 F. 2d 626 (C.A. 8), certiorari denied *sub nom. Delozier* v. *Thompson*, 335 U.S. 886.

[4] The Government's vital interest in the strict observance of the veterans' statutory reemployment rights needs little elaboration. The wholehearted acceptance by the citizen of his obligation to render military service is more readily forthcoming in circumstances where he is secure in the knowledge that he will not be placed at a disadvantage in his civilian employment by reason of such service. This consideration undoubtedly influenced the Congressional decision to permit representation of the veteran by the Department of Justice. See n. 1, *supra*, p. 2.

SUMMARY OF ARGUMENT

As the Court of Appeals appears to concede, its determination as to the scope of petitioner's reemployment rights guaranteed by the Selective Training and Service Act runs counter to the interpretation given Section 8(c) of the Act by this Court in *Oakley* v. *Louisville & N. R. Co.*, 338 U. S. 278, *i. e.*, that the veteran must be restored to the position he would have held if he had remained continuously in his civilian employment. This interpretation, which was expressly affirmed by Congress in later acts, is clearly correct and governs this case. The judgment below should therefore be reversed.

ARGUMENT

1. Section 8(*c*) of the Selective Service and Training Act, 50 U. S. C. App. (1946 ed.) 308(c), requires that the returning veteran be restored to his job "without loss of seniority". In *Oakley* v. *Louisville & N. R. Co.*, 338 U. S. 278, the most recent decision of this Court under the Act, it was squarely held [338 U. S. at 283] that this means that the veteran is entitled to restoration:

> not to a position which would be the precise equivalent of that which he had left when he joined the Armed Forces, but rather a position which, on the moving escalator of terms and conditions affecting that particular employment, would be comparable *to the position which he would have held if he had remained*

continuously in his civilian employment. [Emphasis added][5]

And this so-called "escalator principle" was expressly reaffirmed by Congress in Section 9(c)(2) of the Selective Service Act of 1948, 62 Stat. 604, 615, 50 U.S.C. App. 459(c)(2).[6]

The court below recognized, as it was compelled

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[5] This holding, which was reiterated, in slightly differing words, six times in the *Oakley* opinion [338 U.S. at 279, 282, 283, 284, 285], followed logically from the Court's earlier decisions in the *Fishgold* and *Trailmobile* cases, *supra*. In *Fishgold*, the Court noted [328 U.S. at 284] that the Act was designed to insure that the employee "who was called to the colors [would not] be penalized on his return by reason of his absence from his civilian job" and further [328 U.S. at 288] that "Congress recognized in the Act the existence of seniority systems and seniority rights" and "sought to preserve the veteran's rights under those systems and to protect him against loss by reason of his absence". In *Trailmobile*, it was again stated [331 U.S. at 58] that the "restored veteran * * * could not be disadvantaged by his service to the nation" and was not to be penalized on his return because of his absence from his civilian job. See also *Aeronautical Industrial District Lodge 727 v. Campbell*, 337 U.S. 521, 529.

[6] Section 9(c)(1) of the Selective Service Act of 1948, 50 U.S.C. App. 459(c)(1), is identical with Section 8(c) of the 1940 Act. Section 9(c)(2) provides that:

> It is hereby declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

In 1951, the 1948 Act was continued as the Universal Military Training and Service Act, 65 Stat. 75.

to, that had petitioner remained continuously in the employ of the respondent railroad, he would have completed 1160 days service as a temporary car-man mechanic on June 1, 1946, and, under the collective bargaining agreement pertaining to his craft, would have been promoted on that date to a permanent car-man mechanic position. Nevertheless, the court determined that petitioner was entitled to seniority as a mechanic only from January 10, 1949, the date on which, because of his period of service in the armed forces, he actually obtained the requisite on-the-job experience. This holding has the conceded consequence of subordinating petitioner on the applicable seniority roster to the four non-veteran intervening defendants, all of whom had remained in the continuous employ of the railroad and had completed 1160 days of work as temporary mechanics prior to January 10, 1949, but subsequent to June 1, 1946.

The justification advanced by the Court of Appeals for its rejection of the "continuous employment" test laid down in *Oakley* and carried over into the Selective Service Act of 1948 was that that test conflicts with the provision in Section 8(c) [50 U.S.C. App. (1946 ed.) 308(c)] that the returning veteran "shall be considered as having been on furlough or leave of absence." Finding this purported conflict to be irreconcilable, the court ruled that the "furlough or leave" clause must govern [211 F. 2d at 99]. Since petitioner had been accorded the same seniority on the me-

chanic's roster as he would have been given under the collective bargaining agreement had he been on an ordinary leave of absence instead of in military service, the court reasoned that the requirements of the statute had been fulfilled [211 F. 2d at 99-100].

The fundamental error in this theory is amply demonstrated by petitioner's examination of the structure and legislative history of the Act (Pet. Br. pp. 14-21). Without repeating here the content of that examination, we think it leads inescapably to petitioner's conclusion that the "furlough or leave" clause was not intended to operate as a restriction on the right conferred upon the employee by the Congress to be restored "without loss of seniority"; and, further, that a reasonable reading of Section 8(c) prohibits such operation. The language of the Section, taken as a whole, makes it plain that its several clauses are to be considered as cumulative and not as limitations upon one another. And equally plain from the legislative history is that the purpose of the "furlough or leave" clause was not to prevent the application of the "escalator principle" in these circumstances, but rather was, as petitioner suggests, to provide further protection to the returning veteran against being placed at a disadvantage because of his military service.[7]

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[7] These conclusions are buttressed, we believe, by the fact that in the Selective Service Act of 1948 Congress both carried over the "furlough or leave" clause and expressly adopted the "continuous employment" test. Cf. n. 6, *supra*, p. 5.

2. It is important to note, we believe, that petitioner's construction of the statute does not have the effect of destroying or undermining the seniority system created by the railroad and the union. Petitioner takes that system as it exists—subject simply to the condition, set forth in the statute, that the rules of the system be applied to him as they would have been applied had not military service intervened. And this approach, *i.e.* reading together the seniority provisions of collective bargaining agreements and those of the Act, is neither new nor unusual. As petitioner observes (Pet. Br., p. 10, fn. 3), the agreements between unions and a number of the other major railroads in the country contain provisions requiring the employer to compute the seniority of an employee in this situation in the precise fashion petitioner would have the respondent compute his seniority.[8] Similar agreements are to be found in the oil industry, the automobile industry, and the steel industry.

The sound basis for the preservation of reemployment rights in the manner provided by these

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And, while the instant action is governed by the Selective Service and Training Act of 1940, the court below properly conceded [211 F. 2d at 98] that Congress did not intend the measure of the veterans' rights under that Act to be any different. This concession forced the court to find a conflict not only between *Oakley* and Section 8(c) of the 1940 Act, but additionally between Sections 9(c)(1) and 9(c)(2) of the 1948 Act.

[8] While these agreements are not in the record below, they are on file as a matter of public record with the National Mediation Board, as is required by Section 5, third (e), of the Railway Labor Act, 48 Stat. 1195, as amended, 45 U.S.C. 155.

agreements is revealed by a consideration of the irrevocable effect which results from any loss of standing. Seniority provisions were developed in the collective bargaining process to provide employees with maximum security and certainty as to their relative position in their employment relationship. While the objective standard provided by an employee's seniority or length of service is used most frequently in determining the order of layoff [9] and rehiring, it has also been commonly used to avoid favoritism, discrimination, and arbitrary action with regard to promotions, transfers to more desirable duties or to better machines, the choice of shifts, the choice of vacation time, selection for overtime work, and other matters which are generally considered as presenting alternatives of varying desirability. *Collective Bargaining Provisions,* U. S. Bureau of Labor Statistics Bull. No. 907, c. 2, p. 73 (1948); *Union Agreement Provisions,* U. S. Bureau of Labor Statistics Bull. No. 686, 117, 125-137 (1942); Greenman, *Getting Along with Unions,* 25-26 (1948); Williamson & Harris, *Trends in Collective Bargaining,* 100 (1945); The Twentieth Century Fund, *How Collective Bargaining Works,* 29 (1942). And although seniority rights thus may be inchoate in the sense that they

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[9] A common feature of seniority clauses governing layoffs is the "bumping" privilege, which entitles an employee with greater seniority to "bump" a junior from a lower position for which the senior employee is qualified. *Collective Bargaining Provisions, infra,* c. 1, p. 18; *Union Agreement Provisions, infra,* 130.

become effective only upon the happening of certain events (*e.g.*, the occurrence of a vacancy on a more desirable shift) this hardly affects their value to the employee or makes them less real than an unconditional right when the contingency materializes.

CONCLUSION

For the above reasons, we urge this Court to reverse the judgment below.

Respectfully submitted.

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JANUARY, 1955.

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Decisions Per Curiam.

No. 246. DIEHL *v.* LEHIGH VALLEY RAILROAD CO. ET AL. Certiorari, 348 U. S. 860, to the United States Court of Appeals for the Third Circuit. Argued February 28, March 1, 1955. Decided March 14, 1955. *Per Curiam:* Upon the facts disclosed in the opinion of the Court of Appeals for the Third Circuit, 211 F. 2d 95, the applicable Acts of Congress, and the opinion of this Court in *Oakley* v. *Louisville & Nashville R. Co.*, 338 U. S. 278, the judgment of the Court of Appeals is reversed. MR. JUSTICE REED dissents for the reasons given in the opinion of the Court of Appeals for the Third Circuit. *Harry Montgomery Leet* argued the cause for petitioner. With him on the brief was *Sheldon E. Bernstein*. *Richard R. Lyman* argued the cause for respondents. With him on a brief were *Clarence M. Mulholland* and *Edward J. Hickey, Jr.* for the System Federation No. 96, Railway Employes' Department, A. F. of L., et al., respondents. *Thomas Price Mikell* and *Harry E. Sprogell* filed a brief for the

Lehigh Valley Railroad Co., respondent. *Solicitor General Sobeloff, Assistant Attorney General Burger* and *Samuel D. Slade* filed a memorandum for the United States, as *amicus curiae,* urging reversal.